# DOCKET

# SUPREME COURT
## OF THE UNITED STATES

No. 11-8976
Vide 11-8978
Title: Calvin Smith and John Raynor, Petitioners
v.
United States
Docketed: February 28, 2012
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (05-3051, 05-3052)
Decision Date: July 29, 2011
Rehearing Denied: November 30, 2011

**Questions Presented**

| ~~~Date~~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Feb 27 2012 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 29, 2012) |
| Mar 22 2012 | Order extending time to file response to petition to and including April 30, 2012. |
| Apr 25 2012 | Order further extending time to file response to petition to and including May 14, 2012. |
| May 14 2012 | Brief of respondent United States in opposition filed. |
| May 29 2012 | Reply of petitioner Calvin Smith and John Raynor filed. (Distributed) |
| May 30 2012 | DISTRIBUTED for Conference of June 14, 2012. |
| Jun 18 2012 | Motion to proceed in forma pauperis GRANTED. The petition for a writ of certiorari GRANTED limited to Question II presented by the petition. |
| Jul 17 2012 | The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 20, 2012. |
| Jul 17 2012 | The time to file respondent's brief on the merits is extended to and including October 5, 2012. |
| Jul 17 2012 | Counsel for the petitioner agrees to file any reply brief on the merits on or before October 26, 2012. |
| Jul 23 2012 | SET FOR ARGUMENT ON Tuesday, November 6, 2012 |
| Aug 20 2012 | Joint appendix filed. |
| Aug 20 2012 | Brief of petitioners Calvin Smith and John Raynor filed. |
| Aug 24 2012 | CIRCULATED. |
| Aug 27 2012 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed) |
| Aug 31 2012 | Record received from U.S.C.A. for District of Columbia Circuit. (3 boxes) |
| Aug 31 2012 | Record received from U.S.D.C. for District of Columbia. (26 boxes) |
| Oct 5 2012 | Brief of respondent United States filed. (Distributed) |

| | |
|---|---|
| Oct 26 2012 | Reply of petitioners Calvin Smith and John Raynor filed. (Distributed) |
| Nov 6 2012 | Argued. For petitioners: A. J. Kramer, Federal Public Defender, Washington, D. C. For respondent: Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. |

# PETITION
# FOR
# WRIT OF
# CERTIORARI

No. 11-_________

# IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

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CALVIN SMITH and JOHN RAYNOR,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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A.J. KRAMER
FEDERAL PUBLIC DEFENDER
LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
(Counsel of Record)
625 Indiana Avenue, NW
Suite 550
Washington, D.C.  20004
(202) 208-7500
Counsel for Petitioners

# QUESTIONS PRESENTED

I. Whether in reviewing a claim under Batson v. Kentucky, 476 U.S. 79 (1986), an appellate court must 1) apply *de novo* review where a federal trial judge failed to make specific findings on the question whether the prosecution's proffered justifications for challenged peremptory strikes were pretextual; and 2) review each of the government's explanations for each challenged strike where the prosecution proffered multiple explanations for certain peremptory strikes.

II. Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period -- a fundamental due process question that is the subject of a well-developed circuit split.

## LIST OF PARTIES

Other parties to the proceeding in the D.C. Circuit were:

Kevin Gray
Rodney Moore
Timothy Handy
Lionel Nunn

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**IN THE SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 2011**

---

**CALVIN SMITH and JOHN RAYNOR,**

**PETITIONERS,**

**v.**

**UNITED STATES OF AMERICA,**

**RESPONDENT.**

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

---

Calvin Smith and John Raynor respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINION BELOW

The decision of the D.C. Circuit, United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011), is reproduced in the appendix to this petition at Pet. App. 1-72. The Court's judgment is at Pet. App. 73. The Court's orders denying panel rehearing and rehearing en banc are at Pet. App. 74-75.

## JURISDICTION

The D.C. Circuit issued its opinion and judgment (Pet. App. 1-73) on July 29, 2011. Panel rehearing and rehearing en banc were denied on November 30, 2011. (Pet. App. 74-75). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause provides:

> nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

The Due Process Clause provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

After a ten-month jury trial in the United States District Court for the District of Columbia, Petitioner Calvin Smith and Peititioner John Raynor (along with co-defendants Rodney Moore, Kevin Gray, Timothy Handy, and Lionel Nunn) were convicted of participating in a federal drug conspiracy and a RICO conspiracy, as well as committing various substantive offenses related to the charged conspiracies. Both received life sentences.

On consolidated appeal to the D.C. Circuit, remands were granted on certain specific counts, but the drug conspiracy and RICO conspiracy convictions, as well as most of the substantive counts, were affirmed, along with Petitioners' life sentences.

United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011) (Pet. App. 1-72).

A timely joint petition for panel rehearing and rehearing en banc was filed on behalf of all six defendants. On October 13, 2011, the D.C. Circuit ordered the government to file a response to the rehearing petition limited to the conspiracy withdrawal instruction issue raised here by Petitioner Smith as the second Question Presented. Rehearing and rehearing en banc were denied on November 30, 2011. (Pet. App. 74-75).

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD RESOLVE THE APPROPRIATE STANDARD OF REVIEW FOR A BATSON CLAIM WHERE MULTIPLE EXPLANATIONS WERE PROFERRED FOR CERTAIN CHALLENGED STRIKES AND THE FEDERAL TRIAL JUDGE MADE ONLY CONCLUSORY FINDINGS INSUFFICIENT TO PERMIT MEANINGFUL APPELLATE REVIEW.

The Constitution's equal protection guarantee bars prosecutors from using peremptory challenges to strike prospective jurors on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). As recognized by the D.C. Circuit:

> A Batson challenge proceeds in three steps: First, the defendant must establish "a prima facie case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial." Second, "the State [must] come forward with a neutral explanation for challenging jurors within an arguably targeted class." Third, the "trial court then will have the duty to determine if the defendant has established purposeful discrimination."

Pet. App. 16 (quoting Miller-El v. Dretke, 545 U.S. 231, 239 (2005)).

Here, Petitioners argued in the trial court and in the D.C. Circuit that the government violated Batson by using its peremptory strikes to eliminate certain African-American jurors based on their race.

The D.C. Circuit rejected this argument on appeal, with Judge Rogers concurring separately. The main opinion reviewed the district court's denial of Petitioners' Batson challenges under a "clearly erroneous" standard. Pet. App. 16 ("'On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous;'" "'in the absence of exceptional circumstances, we would defer to the trial court'") (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). Petitioners argued that the Court of Appeals should reject the trial judge's findings under Batson because the judge did not address the challenged strikes individually, but the panel disagreed. The panel reasoned that the trial court had found the prosecutor's race-neutral justifications genuine after hearing detailed arguments from the parties and observing the demeanor of the prosecutors and prospective jurors. In the absence of controlling precedent requiring a trial court to "render its decision in a strike-by-strike format," the panel "c[ould] not conclude that the lack of strike-specific findings creates the sort of 'exceptional circumstances' that would overcome our deference to the trial court." Pet. App. 17 (quoting Snyder, 552 U.S. at 477).

The panel then went through each strike challenged on appeal and, applying clear error review, identified what it deemed a plausible race-neutral reason for each strike. (Pet. App. 17-19). The Court of Appeals then rejected Petitioners' Batson claim on the ground that they had "failed to sufficiently undermine the government's race-neutral explanations for its peremptory strikes," "[e]specially given the deferential standard under which we review challenges to the district court's decisions on this issue." Pet. App. 19.

Judge Rogers argued in concurrence that this Court's precedents emphasize the importance of the trial judge's role at step three of the Batson inquiry, that "conclusory or dismissive rulings" by the trial court do not fulfill that duty, and that when this Court has encountered such cases, "it has not hesitated to examine the voir dire proceedings in painstaking detail" and to apply what was "tantamount to de novo review." Pet. App. 68-70 (Rogers, J., concurring):

> An example of such detailed review is Snyder, where the trial judge failed to make a finding on the record based on the evidence presented regarding the prosecutor's two explanations for striking an African American juror, and consequently the deference inherent in clear error review was replaced by what was tantamount to de novo review. See 552 U.S. at 479, 482. This is reflected in the practice of circuit courts of appeals when reviewing contentions that would normally be subject to clear error review but for the

> fact that the district court made no findings of fact. [Citing cases from six circuits]. As to the first of two explanations proffered, the Supreme Court reasoned in Snyder that, in the absence of a specific finding, it could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." Id. As to the second proffered explanation, the Supreme Court concluded, quoting at length the transcription of the trial court proceedings, that the prosecutor's "explanation given for the strike . . . is by itself unconvincing," id. at 478, and that "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting [time] obligations that appear to have been at least as serious as [those of the struck black juror]," id. at 483.

Pet. App. 70 (Rogers, J., concurring).

Judge Rogers further noted that this Court in Miller-El v. Dretke, 545 U.S. 231 (2005), conducted "a searching record review" before concluding that the trial judge's factual findings as to the nonpretextual nature of the government's proffered justifications were wrong by clear and convincing evidence. Id.

Inasmuch as a prosecutor's Batson response "must [be] a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," Batson, 476 U.S. at 98 n.20 (quotation omitted), Judge Rogers reasoned that "[i]t would be remarkable, to say the least, to conclude that the trial judge's evaluation at step three of the Batson analysis need not also be clear and reasonably specific." Pet. App. 70 (Rogers, J., concurring). Judge Rogers thus interpreted this Court's cases as contemplating "that the trial judge would provide a record that reveals on an objection-by-objection basis how, upon considering 'all of the circumstances that bear upon the issue of racial animosity,' [Snyder, 552 U.S. at 478] (citing Miller-El v. Dretke, 545 U.S. at 239), the defense objections to the prosecutor's strike explanations were resolved." Pet. App. 71 (Rogers, J., concurring).

> Because the district court's findings in the instant case were conclusory, without sufficient explanation to permit meaningful appellate review, the usual deferential review falls away and the question is whether this court, upon review of the record, finds by a preponderance of the evidence that the defendant has established purposeful discrimination by the prosecutor.

Id.

Judge Rogers then rejected Petitioners' Batson claims, discussing the record as to only one strike before concluding, "For essentially the reasons stated by the court with respect to the remaining strikes, see [Pet. App. 17-19], each likewise survives de novo review of the record." Id. at 72.

This Court should grant review in this case in order to 1) resolve the standard of review question highlighted by the concurring opinion; and 2) make clear that where a prosecutor proffers multiple justifications for striking a particular juror and the trial judge does not make specific findings as to each reason, the reviewing court must -- whatever the standard of review -- review each reason.

First, for all of the reasons stated in Judge Rogers's concurrence, de novo review should be required in cases, such as this one, where district courts have made Batson rulings with insufficient explanation to permit meaningful appellate review. The concurrence here acknowledged that this Court had adopted a clear error standard of review in Snyder but noted that, in doing so, the Snyder Court had cited the plurality opinion in Hernandez v. New York, 500 U.S. 352 (1991), "in which concern was expressed that a more searching review of findings made in a state trial court would be incompatible with concepts of federalism." (Pet. App. 70 n.3) (Rogers, J., concurring). As Judge Rogers pointed out in advocating for a de novo review standard in this case, "[n]o federalism concern exists" with respect to appellate review of Batson claims arising in federal district courts. Id.

This Court should therefore remand to the D.C. Circuit with instructions to review the district court's conclusory Batson ruling de novo. While district court findings are generally entitled to deference, given that the dismissal of even a single prospective juror on the basis of race violates equal protection principles, see Snyder, 552 U.S. at 478, without reasoned findings of fact on each strike, there is nothing to which to defer and an appellate court must itself ensure that the record does not establish a Batson violation. Although Judge Rogers thought Petitioners' Batson claim failed under de novo review, she came to that conclusion based "essentially" on the reasons given by the other two members of the panel, Pet. App. 72, who clearly applied a more deferential standard of review and might well have reached a different result under a more probing standard.

Second, regardless whether review should have been for clear error or de novo, this Court should also grant this petition in order to clarify that, where multiple justifications are proffered for certain strikes, the D.C. Circuit's approach of identifying one plausible justification for each strike and affirming on that basis is inconsistent with this Court's reasoning in Snyder.

In Thaler v. Haynes, 130 S. Ct. 1171 (2010), a single explanation -- demeanor -- was given for the challenged strike and this Court ruled that the trial judge could credit the prosecutor's reliance on demeanor even if the judge did not personally observe the cited behavior. The Thaler Court specifically distinguished Snyder as "concern[ing] a very different problem" in that the prosecutor in Snyder "asserted that he had exercised a peremptory challenge for two reasons, one of which was based on demeanor . . . , and the trial judge overruled the Batson objection without explanation." Thaler, 130 S. Ct. at 1174. "We concluded that the record refuted the explanation that was not based on demeanor and, in light of the particular circumstances of the case, we held that the peremptory challenge could not be sustained on the demeanor-based ground, which might not have figured in the trial judge's unexplained ruling." Id.

Indeed, this Court was very clear in Snyder that, where multiple explanations are proffered for a challenged strike and the trial court does not explain its rejection of the Batson challenge, an appellate court "cannot presume" that the trial judge relied on a particular explanation. Snyder, 552 U.S. at 479. Yet that is exactly what the D.C. Circuit did below by going through each challenged strike and selecting one justification to analyze and affirm on, while ignoring other justifications that may have provided the actual basis for the trial court's ruling. See Pet. App. 17 (court discussing #2932's worry about delay where it was "[a]mong [the prosecution's] concerns"); Pet. App. 18 (court discussing #4730's views of death penalty and law enforcement where "the government claims to have struck 4730 in part" because of those views).

Where multiple justifications are given, all of the reasons must be evaluated for pretext. See Snyder, 552 U.S. at 478 ("all of the circumstances that bear upon the issue of racial animosity must be consulted" such that, if the explanation for striking juror Brooks was not itself unconvincing, "a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks."). Thus, even where it is clear which reasons a trial court accepted, it is not enough for an appellate court to find one of them valid and ignore the others because the pretextual nature of an unreviewed explanation could alter the appellate court's analysis of the explanation that was considered. Cf. id. at 485 (leaving open question whether, where one explanation is pretextual, government might be able to save strike by proving it would have stricken jury for nonpretextual reasons alone).

Because the D.C. Circuit's Batson analysis is inconsistent with this Court's decisions in Snyder and other Batson cases, this Court should grant the petition and remand for the D.C. Circuit to reconsider Petitioners' Batson claim under a de novo standard of review with consideration of all of the explanations proffered for the challenged strikes.

## II. THERE IS A WELL-DEVELOPED CIRCUIT SPLIT ON THE QUESTION WHETHER WITHDRAWING FROM A CONSPIRACY PRIOR TO THE STATUTE OF LIMITATIONS PERIOD NEGATES AN ELEMENT OF CONSPIRACY SUCH THAT DUE PROCESS REQUIRES THAT THE GOVERNMENT BEAR THE BURDEN OF PERSUASION ON THE WITHDRAWAL ISSUE.

Petitioner Smith introduced evidence to establish that he had withdrawn from the conspiracy before the statute of limitations period. The court therefore instructed the jury: "If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before . . . May 5th, 2000 for defendant Calvin Smith . . . you must find the defendant[] not guilty of Count One." Pet. App. at 57.

After deliberating for nearly 12 days, the jury asked the court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" Over objection, the district court told the jury that "[o]nce the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence." Pet. App. 57.

On appeal, Petitioner Smith argued that this instruction violated his right to due process. The D.C. Circuit agreed that due process requires the government to prove beyond a reasonable doubt all elements of the offense. Id. (citing In re Winship, 397 U.S. 358 (1970)). "As a consequence, when a defendant raises (by meeting his burden of production) a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense." Id. (citing Dixon v. United States, 548 U.S. 1, 11 (2006) ("We require[] the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence that tended to prove insanity also tended to disprove an essential element of the offense charged.")).

The D.C. Circuit recognized that the crime of conspiracy presumes continuity such that once the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership therein unless and until the defendant withdraws. Pet. App. 57. Petitioner alleged that, because it is the government's burden to prove that the defendant was a member of the conspiracy during the limitations period, evidence that the defendant withdrew before the limitations period negates that element such that the burden must then be on the government to prove that the defendant did not so withdraw.

The D.C. Circuit summarized a 5-5 split in the federal circuits on this burden of proof question:

> Our sister circuits have differed on this issue. While some have said that the burden of proving withdrawal always rests on the defendant, see, e.g., United States v. Eppolito, 543 F.3d 25, 49 (2d Cir. 2008); United States v. Arias, 431 F.3d 1327, 1340 (11th Cir. 2005); United States v. Brown, 332 F.3d 363, 274 (6th Cir. 2003); United States v. Hughes, 191 F.3d 1317, 1322 (10th Cir. 1999); United States v. Pettigrew, 77 F.3d 1500, 1514 (5th Cir. 1996), others have held that, once the defendant meets his burden of production that he has withdrawn prior to the relevant limitations period, the burden of persuasion shifts to the government, see e.g., United States v. Read, 658 F.2d 1225, 1232-33 (7th Cir. 1981); United States v. Antar, 53 F.3d 568, 582-83 (3d Cir. 1995), abrogated on other grounds by Smith v. Berg, 247 F.3d 532 (3d Cir. 2001); United States v. Lothian, 976 F.2d 1257, 1261-62 (9th Cir. 1992); United States v. West, 877 F.2d 281, 289 (4th Cir. 1989); United States v. Dyer, 821 F.2d 35, 39 (1st Cir. 1987).

Pet. App. 57.

The D.C. Circuit concluded that it was not "writ[ing] on a blank slate" because circuit law held -- "albeit in the context of sentencing" -- that "the defendant, not the government, 'has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement.'" Pet. App. at 57-58 (citations omitted). The D.C. Circuit therefore concluded that it was "obliged" to follow precedent and uphold the instruction placing the burden of persuasion on Petitioner Smith to show that he withdrew from the conspiracy before the limitations period. Pet. App. 58.

Petitioner Smith sought rehearing and rehearing en banc on this issue, arguing that sentencing cases, such as those the D.C. Circuit had considered itself obliged to follow, do not implicate the same due process considerations that apply when a jury instruction shifts to the defense the burden of proving an element of a crime at trial. The D.C. Circuit ordered the government to respond to the request for rehearing and rehearing en banc on the withdrawal instruction issue but ultimately denied any rehearing, thus creating a 6-5 circuit split on the issue raised here.

The burden of proof question presented by this petition is an important and recurring constitutional question that has seriously divided the federal appellate courts. Because conspiracies are ongoing crimes that often exist over several years, with membership changing throughout, and because conspiracies are often prosecuted only after years of investigation, whether a particular defendant withdrew from a particular conspiracy before the statute of limitations period is a question that arises with great frequency in conspiracy trials. Whether due process places on the government the burden of persuasion on the withdrawal issue is a fundamental question of constitutional law that this Court should resolve.

This Court should grant the petition on this question and grant Petitioner Smith a new trial on all counts.[1]

## CONCLUSION

Petitioners respectfully ask the Court to grant the petition for certiorari.

Respectfully submitted,

A.J. KRAMER,
FEDERAL PUBLIC DEFENDER

Lisa B. Wright

LISA B. WRIGHT
(Counsel of Record)
ASSISTANT FEDERAL PUBLIC DEFENDER
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Calvin Smith and John Raynor

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[1] The tainted conspiracy convictions also tainted Petitioner Smith's substantive convictions in light of the vicarious liability jury instruction given by the trial court under Pinkerton v. United States, 328 U.S. 640 (1946) (conspirator responsible for offenses committed by co-conspirator in furtherance of conspiracy).

**H**

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, Appellee
v.
Rodney L. MOORE, also known as Rasoo, Appellant.

Nos. 05–3050, 05–3051, 05–3052, 05–3053, 05–3054, 05–3064.
Argued March 24, 2011.
Decided July 29, 2011.

**Background:** Six defendants were convicted in the United States District Court for the District of Columbia, 173 F.Supp.2d 1,2011 WL 3211511, and 254 F.Supp.2d 1, on multiple charges, including drug conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, continuing criminal enterprise (CCE), murder, and other related charges in violation of federal and District of Columbia laws, and they appealed.

**Holdings:** The Court of Appeals held that:
(1) court appropriately exercised its *Batson* responsibilities;
(2) defendants failed to sufficiently undermine government's race-neutral explanations for its peremptory strikes of prospective African–American jurors;
(3) court did not abuse its discretion in granting government's motion for an anonymous jury;
(4) even assuming that prosecutorial misconduct occurred during relatively small portions of lengthy opening and closing arguments, such arguments did not substantially prejudice defendants;
(5) admission of DEA reports of analyses of seized drugs, without providing defendants an opportunity to cross-examine the forensic chemists who prepared them, constituted Confrontation Clause violations; and
(6) defendant made out a colorable claim that trial counsel failed to provide constitutionally adequate assistance in electing not to call sole eyewitness to charged murder.

Affirmed in part, vacated in part, and remanded.

Rogers, Circuit Judge, filed opinion concurring in Part I.

West Headnotes

**[1] Jury 230 🔑33(5.15)**

230 Jury
  230II Right to Trial by Jury
    230k30 Denial or Infringement of Right
      230k33 Constitution and Selection of Jury
        230k33(5) Challenges and Objections
          230k33(5.15) k. Peremptory challenges. Most Cited Cases

Constitution's equal protection guarantee bars prosecutors from using peremptory challenges to strike prospective jurors on the basis of race. U.S.C.A. Const.Amend. 5.

**[2] Criminal Law 110 🔑1158.17**

110 Criminal Law
  110XXIV Review
    110XXIV(O) Questions of Fact and Findings
      110k1158.17 k. Jury selection. Most Cited Cases

On appeal of district court's *Batson* decision, court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.

**[3] Jury 230 🔑33(5.15)**

230 Jury
  230II Right to Trial by Jury
    230k30 Denial or Infringement of Right
      230k33 Constitution and Selection of Jury
        230k33(5) Challenges and Objections
          230k33(5.15) k. Peremptory challenges. Most Cited Cases

District court appropriately exercised its *Batson* responsibilities by requiring a prosecution opening in which the government individually justified each strike of an African–American juror, a defense response disputing those government explanations, and a prosecution reply to every defense argument, and by questioning counsel, reviewing its own notes, and correcting mistakes by counsel before concluding, based on the arguments and its personal observation of the prosecutors and of the prospective jurors' demeanor, that the government's race-neutral explanations were genuine; lack of strike-specific findings did not create the sort of "exceptional circumstances" that would overcome appellate court's deference to the trial court, particularly in light of fact that 9 of the 12 jurors seated in the case were African–American. U.S.C.A. Const.Amend. 5.

**[4] Jury 230 ⇨33(5.15)**

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Dismissal of even a single prospective juror on the basis of race violates equal protection principles. U.S.C.A. Const.Amend. 5.

**[5] Jury 230 ⇨33(5.15)**

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Defendants failed to sufficiently undermine government's race-neutral explanations for its peremptory strikes of prospective African–American jurors in prosecution on multiple charges, and therefore were unable to establish any *Batson* violations; circumstances of the case in which 9 of the 12 jurors seated were African–American strongly suggested that the prosecution did not discriminate on the basis of race. U.S.C.A. Const.Amend. 5.

**[6] Constitutional Law 92 ⇨4616**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4613 Presence and Appearance of Defendant and Counsel
92k4616 k. Custody and restraint. Most Cited Cases

**Criminal Law 110 ⇨637.5**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.5 k. Particular cases. Most Cited Cases

**Criminal Law 110 ⇨637.7**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.7 k. Visibility of restraint; restraint not observed by jurors. Most Cited Cases

**Criminal Law 110 ⇨637.9(2)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.9 Procedure
110k637.9(2) k. Hearing. Most Cited Cases

District court did not violate defendants' due process rights when, without holding an evidentiary hearing, it ordered them to wear stun belts at trial; district court considered the security concerns presented by the particular defendants at trial before making the determination, thoroughly examined factors relevant to each

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defendant and, in the exercise of its broad discretion, made a determination based on those factors, and court specifically ordered precautions to reduce the visibility of the belts. U.S.C.A. Const.Amend. 5.

**[7] Criminal Law 110 🔑637.9(2)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.9 Procedure
110k637.9(2) k. Hearing. Most Cited Cases

When making a discretionary decision whether to authorize an inherently or actually prejudicial method of restraint at trial, a formal evidentiary hearing may not be required, but if the factual basis for the extraordinary security is controverted, the taking of evidence and finding of facts may be necessary. U.S.C.A. Const.Amend. 5.

**[8] Criminal Law 110 🔑1152.2(2)**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.2 Jury
110k1152.2(2) k. Selection and impaneling. Most Cited Cases

Empaneling an anonymous jury is reviewed is for abuse of discretion.

**[9] Jury 230 🔑144**

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and identity of jurors. Most Cited Cases

Factors considered in determining whether to empanel an anonymous jury are: (1) the defendant's involvement in organized crime,(2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

**[10] Jury 230 🔑144**

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and identity of jurors. Most Cited Cases

District court did not abuse its discretion in granting government's motion for an anonymous jury in a high-profile prosecution of a major drug conspiracy involving multiple defendants over a substantial period of time and alleged purposeful and random acts of murder; particular allegations of multiple acts of violence to prevent individuals from contacting law enforcement were sufficient, viewed in context, for the district court to be concerned about defendants' capacity to harm jurors and interfere with the judicial process, and precautions were taken to downplay the significance of jurors' anonymity.

**[11] Criminal Law 110 🔑1037.1(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

**Criminal Law 110 🔑1171.1(2.1)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts,

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Comments, and Arguments
110k1171.1(2.1) k. In general. Most Cited Cases

Appellate review of allegedly improper prosecutorial arguments is for substantial prejudice where the defendants lodged an objection, but plain error standard is applied where they failed to object.

**[12] Criminal Law 110 ⟹1152.19(7)**

110 Criminal Law
  110XXIV Review
    110XXIV(N) Discretion of Lower Court
      110k1152 Conduct of Trial in General
        110k1152.19 Counsel
          110k1152.19(7) k. Arguments and statements by counsel. Most Cited Cases

When alleged prosecutorial misconduct forms the basis for an unsuccessful motion for a mistrial, appellate review of the district court's denial of that motion is for abuse of discretion.

**[13] Criminal Law 110 ⟹1134.47(4)**

110 Criminal Law
  110XXIV Review
    110XXIV(L) Scope of Review in General
      110XXIV(L)4 Scope of Inquiry
        110k1134.47 Counsel
          110k1134.47(4) k. Arguments and conduct of counsel. Most Cited Cases

**Criminal Law 110 ⟹1144.10**

110 Criminal Law
  110XXIV Review
    110XXIV(M) Presumptions
      110k1144 Facts or Proceedings Not Shown by Record
        110k1144.10 k. Conduct of trial in general. Most Cited Cases

Appellate court will presume that a jury acts with common sense and discrimination when confronted with an improper remark from a prosecutor and owes deference to the district court's assessment of such a statement's prejudicial impact on the jury.

**[14] Criminal Law 110 ⟹2089**

110 Criminal Law
  110XXXI Counsel
    110XXXI(F) Arguments and Statements by Counsel
      110k2088 Matters Not Sustained by Evidence
        110k2089 k. In general. Most Cited Cases

**Criminal Law 110 ⟹2146**

110 Criminal Law
  110XXXI Counsel
    110XXXI(F) Arguments and Statements by Counsel
      110k2145 Appeals to Sympathy or Prejudice
        110k2146 k. In general. Most Cited Cases

In making opening and closing arguments, a prosecutor has an obligation to avoid making statements of fact to the jury not supported by proper evidence introduced during trial, even when the misstatements are made in good faith; additionally, prosecutor may not make comments designed to inflame the passions or prejudices of the jury.

**[15] Criminal Law 110 ⟹2069**

110 Criminal Law
  110XXXI Counsel
    110XXXI(F) Arguments and Statements by Counsel
      110k2067 Scope and Effect of Opening Statement
        110k2069 k. For prosecution. Most Cited Cases

Prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to poison the jury's mind against the defendant or to recite items of highly questionable evidence; prosecutorial misconduct exists where the government's argument touches upon facts prejudicial to the defendant that the government then fails to support by admissible evidence at trial.

**[16] Criminal Law 110 ⟹2092**

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2092 k. Evidence excluded. Most Cited Cases

**Criminal Law 110 ⟹2103**

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2103 k. In general. Most Cited Cases

In closing argument, counsel may not refer to, or rely upon, evidence unless the trial court has admitted it, but the prosecutor may, for instance, draw inferences from evidence that support the government's theory of the case so long as the prosecutor does not intentionally misrepresent the evidence.

**[17] Criminal Law 110 ⟹1171.1(3)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(3) k. Particular statements, comments, and arguments. Most Cited Cases

**Criminal Law 110 ⟹1171.2**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.2 k. Opening statement. Most Cited Cases

**Criminal Law 110 ⟹2193**

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2193 k. Opening statement. Most Cited Cases

**Criminal Law 110 ⟹2195**

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2195 k. Summing up. Most Cited Cases

Even assuming that prosecutorial misconduct occurred during relatively small portions of lengthy opening and closing arguments, such arguments did not substantially prejudice defendants; there was overwhelming evidence of defendants' guilt of the crimes implicated by the prosecutor's purported misconduct, and the district court gave general limiting instructions on the arguments of counsel to the jury at the beginning of the trial, after the prosecutor's opening argument, and during the final instructions to the jury before it began deliberating.

**[18] Criminal Law 110 ⟹450**

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k450 k. Matters directly in issue. Most Cited Cases

Government's use of FBI agent as overview witness at the outset of its criminal case was inappropriate; FBI agent improperly offered his non-expert opinions about the charged conspiracy and defendants, vouched for the reliability of the investigation and of the cooperating co-conspirator witnesses the government planned to have testify at trial, and discussed evidence that had yet to be introduced. Fed.Rules Evid.Rule 602, 28 U.S.C.A.

**[19] Criminal Law 110 ⇐661**

110 Criminal Law
 110XX Trial
  110XX(C) Reception of Evidence
   110k661 k. Necessity and scope of proof. Most Cited Cases

District court is ordinarily afforded broad discretion to determine the manner in which evidence will be received.

**[20] Criminal Law 110 ⇐452(1)**

110 Criminal Law
 110XVII Evidence
  110XVII(R) Opinion Evidence
   110k449 Witnesses in General
    110k452 Special Knowledge as to Subject-Matter
     110k452(1) k. In general. Most Cited Cases

Government is free to call as its first witness a law enforcement officer who is familiar with the pre-indictment investigation or was otherwise personally involved, where permissible under the Rules of Evidence and consistent with constitutional guarantees.

**[21] Criminal Law 110 ⇐1169.2(8)**

110 Criminal Law
 110XXIV Review
  110XXIV(Q) Harmless and Reversible Error
   110k1169 Admission of Evidence
    110k1169.2 Curing Error by Facts Established Otherwise
     110k1169.2(8) k. Opinions and conclusions. Most Cited Cases

Prejudice resulting from the admission of FBI agent's overview testimony offering his non-expert opinions about the charged conspiracy and defendants, vouching for the reliability of the investigation and of the cooperating co-conspirator witnesses the government planned to have testify at trial, and discussing evidence that had yet to be introduced, to the extent it was inappropriate, was ameliorated, and therefore did not constitute reversible error; in each instance, agent's improper testimony was later confirmed by admissible evidence at trial, and defendants' defense was limited to cross-examining testifying cooperating co-conspirators and other government witnesses.

**[22] Criminal Law 110 ⇐368.68**

110 Criminal Law
 110XVII Evidence
  110XVII(F) Other Misconduct by Accused
   110XVII(F)4 Other Misconduct Inseparable from Crime Charged
    110k368.68 k. In general. Most Cited Cases

When evidence of "other crimes" is "intrinsic" to the charged crime, it is not evidence of "other" acts and is thus wholly unregulated by rule governing admissibility of evidence of other crimes or bad acts; "intrinsic" evidence encompasses evidence that is either of an act that is part of the charged offense or is of acts performed contemporaneously with the charged crime if they facilitate the commission of the charged crime. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

**[23] Criminal Law 110 ⇐1169.11**

110 Criminal Law
 110XXIV Review
  110XXIV(Q) Harmless and Reversible Error
   110k1169 Admission of Evidence
    110k1169.11 k. Evidence of other offenses and misconduct. Most Cited Cases

Any error in allowing government to introduce evidence of uncharged conduct was not reversible in light of the amount and strength of the evidence the government presented of the charged crimes. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

**[24] Criminal Law 110 ⇐1992**

110 Criminal Law
 110XXXI Counsel
  110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and probable effect of information in general. Most Cited Cases

To show prejudice resulting from a *Brady* violation, a defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

**[25] Criminal Law 110 ⇐1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and probable effect of information in general. Most Cited Cases

Nondisclosure of evidence that drugs in major supplier's van were not destined for defendants' organization did not constitute a *Brady* violation; evidence that supplier had distributors outside defendants' organization would not have materially aided defendants, and the drugs were significant simply because their presence corroborated the government's claim that supplier was a major drug dealer for whom defendant would be willing to kill others.

**[26] Criminal Law 110 ⇐1159.2(7)**

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable doubt. Most Cited Cases

Court must accept the jury's guilty verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

**[27] Conspiracy 91 ⇐24(2)**

91 Conspiracy
91II Criminal Responsibility
91II(A) Offenses
91k23 Nature and Elements of Criminal Conspiracy in General
91k24 Combination or Agreement
91k24(2) k. Single or multiple conspiracies. Most Cited Cases

Multiple conspiracies cannot be shown through attempts artificially to split one conspiracy into two based simply on geographic lines.

**[28] Conspiracy 91 ⇐47(12)**

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k47 Weight and Sufficiency
91k47(3) Particular Conspiracies
91k47(12) k. Narcotics and dangerous drugs. Most Cited Cases

Defendants' actions following one defendant's relocation from Southeast to Northeast were not inconsistent with the jury's finding that they continued to jointly lead charged conspiracy to unlawfully distribute drugs and commit murders within limitations period; jury could reasonably infer that defendant's absence from time to time suggested that defendant was a principal acting in a supervisory role, while remaining defendant coordinated the day-to-day operations in the Southeast, and fact that certain conspirators engaged in independent drug transactions did not, on its own, negate the existence of a single conspiracy.

**[29] Indictment and Information 210 ⇐130**

210 Indictment and Information
210VI Joinder
210k126 Joinder of Counts; Multiplicity
210k130 k. Distinct offenses in general. Most Cited Cases

Since charged local offenses were committed as acts in furtherance of the charged conspiracy and/or as predicate acts in the charged Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, all of the charged offenses, local and federal, were thus part of the same series of acts or transactions, and therefore properly joined. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; 18 U.S.C.A. § 1962(d).

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**[30] Criminal Law 110 🔑1139**

110 Criminal Law
  110XXIV Review
    110XXIV(L) Scope of Review in General
      110XXIV(L)13 Review De Novo
        110k1139 k. In general. Most Cited Cases

**Criminal Law 110 🔑1168(2)**

110 Criminal Law
  110XXIV Review
    110XXIV(Q) Harmless and Reversible Error
      110k1168 Rulings as to Evidence in General
        110k1168(2) k. Reception of evidence. Most Cited Cases

Appellate review of the district court's legal conclusions regarding the Confrontation Clause is de novo, and subject to constitutional harmless error analysis. U.S.C.A. Const.Amend. 6.

**[31] Criminal Law 110 🔑662.40**

110 Criminal Law
  110XX Trial
    110XX(C) Reception of Evidence
      110k662 Right of Accused to Confront Witnesses
        110k662.40 k. Use of documentary evidence. Most Cited Cases

Drug Enforcement Administration (DEA) reports of analyses of seized drugs, which were performed by nontestifying DEA forensic chemists, were "testimonial" for Confrontation Clause purposes, and their admission without providing defendants an opportunity to cross-examine the forensic chemists about their representations regarding their training and procedures which they followed regarding the marking of containers and the inspection of seals, and whether chemical reagents and/or analytical instruments used were free from contamination and operating properly constituted Confrontation Clause violations; testimony of surrogate witness through whose testimony the reports were introduced did not militate against finding of constitutional violation since witness did not observe the tests being performed and did not sign the reports as the approving official, but rather, testified that, in performing his review, he was "making an assumption that the chemist used the sample and did the analysis I'm making the assumption that they did do each of the tests that they wrote down on their worksheet." U.S.C.A. Const.Amend. 6; D.C. Official Code, 2001 Ed. § 5–1405(b)(11).

**[32] Criminal Law 110 🔑662.40**

110 Criminal Law
  110XX Trial
    110XX(C) Reception of Evidence
      110k662 Right of Accused to Confront Witnesses
        110k662.40 k. Use of documentary evidence. Most Cited Cases

Autopsy reports of homicide victims prepared by city medical examiner were "testimonial" for Confrontation Clause purposes since the circumstances under which they were prepared would lead an objective witness reasonably to believe that the statements therein finding manner of death to be a homicide caused by gunshot wounds would be available for use at a later trial. U.S.C.A. Const.Amend. 6.

**[33] Criminal Law 110 🔑662.40**

110 Criminal Law
  110XX Trial
    110XX(C) Reception of Evidence
      110k662 Right of Accused to Confront Witnesses
        110k662.40 k. Use of documentary evidence. Most Cited Cases

A document created solely for an evidentiary purpose, made in aid of a police investigation, ranks as "testimonial" for Confrontation Clause purposes. U.S.C.A. Const.Amend. 6.

**[34] Criminal Law 110 🔑1168(2)**

110 Criminal Law
  110XXIV Review
    110XXIV(Q) Harmless and Reversible Error
      110k1168 Rulings as to Evidence in General

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110k1168(2) k. Reception of evidence. Most Cited Cases

Non-structural constitutional error, such as violation of the Confrontation Clause, requires vacation of a conviction only where the error was not harmless beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

**[35] Criminal Law 110 ⟹627.8(3)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k627.5 Discovery Prior to and Incident to Trial
        110k627.8 Proceedings to Obtain Disclosure
          110k627.8(3) k. Application, motion or request; affidavits. Most Cited Cases

**Criminal Law 110 ⟹627.8(4)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k627.5 Discovery Prior to and Incident to Trial
        110k627.8 Proceedings to Obtain Disclosure
          110k627.8(4) k. Examination by court; inspection in camera. Most Cited Cases

A district court has an affirmative duty to engage in an adequate inquiry into the nature of the documents before ruling against Jencks Act production; however, a defendant cannot compel a district court judge to sift through every record in the government's possession merely by speculating that somewhere in those records there might be Jencks Act statements, rather, defense must raise a "colorable claim" that a specific document or set of documents contains Jencks statements. 18 U.S.C.A. § 3500(b).

**[36] Criminal Law 110 ⟹627.7(3)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k627.5 Discovery Prior to and Incident to Trial
        110k627.7 Statements, Disclosure of
          110k627.7(3) k. Statements of witnesses or prospective witnesses. Most Cited Cases

A government witness's guess that an interviewer probably asked him to repeat himself at some point during an interview does not create anything more than speculation that the law enforcement officer's report of that interview was a "substantially verbatim recital" of the interview for Jencks Act purposes. 18 U.S.C.A. § 3500(b).

**[37] Criminal Law 110 ⟹1171.8(1)**

110 Criminal Law
  110XXIV Review
    110XXIV(Q) Harmless and Reversible Error
      110k1171 Arguments and Conduct of Counsel
        110k1171.8 Presentation of Evidence
          110k1171.8(1) k. In general. Most Cited Cases

Any error in government's elicitation of testimony with respect to its witnesses' religious conversion was harmless given the overwhelming evidence of defendants' guilt and fact that such testimony was a relatively minor part of the trial. Fed.Rules Evid.Rule 610, 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 52(a), 18 U.S.C.A.

**[38] Criminal Law 110 ⟹2033**

110 Criminal Law
  110XXXI Counsel
    110XXXI(D) Duties and Obligations of Prosecuting Attorneys
      110XXXI(D)5 Presentation of Evidence
        110k2032 Use of False or Perjured Testimony
          110k2033 k. In general. Most Cited Cases

Government did not act improperly in offering coconspirator a sentencing reduction more than a year after his sentencing based on his substantial assistance to the government, for purpose of determining whether government improperly obtained coconspirator's testimony against dug conspiracy defendant, where coconspirator realized the usefulness of the information he possessed only upon the explanation by new appellate counsel. Fed.Rules Cr.Proc.Rule 35(b)(2)(C), 18 U.S.C.A.

**[39] Criminal Law 110 ⇨1173.2(2)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(2) k. Elements and incidents of offense. Most Cited Cases

Court's refusal to provide the specific instructions requested by defendants on their theory that the government had proven, at most, multiple conspiracies rather than a single conspiracy did not constitute reversible error; in light of the district court's comprehensive instructions to the jury about the defense's multiple-conspiracies theory, which mentioned all of the factors relevant to the jury's determination, defendants were able to effectively present their defense.

**[40] Controlled Substances 96H ⇨40**

96H Controlled Substances
96HII Offenses
96Hk40 k. Continuing criminal enterprise; drug organizations. Most Cited Cases

To convict for engaging in a continuing criminal enterprise (CCE), the government must prove that the defendant committed: (1) a felony violation of the federal narcotics law; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant is an organizer or supervisor; and (5) from which he derives substantial income or resources. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

**[41] Criminal Law 110 ⇨30**

110 Criminal Law
110I Nature and Elements of Crime
110k30 k. Merger of offenses. Most Cited Cases

Defendant's convictions for the felony murder and the premeditated murder of victim merged.

**[42] Criminal Law 110 ⇨42.2**

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.2 k. Power to grant immunity. Most Cited Cases

Decision to grant immunity from prosecution rests solely with the Executive Branch; district court had no authority to immunize witness, or to compel the government to immunize witness. 18 U.S.C.A. § 6003.

**[43] Criminal Law 110 ⇨42.4**

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.4 k. Grounds or justification for grant of immunity. Most Cited Cases

District court did not err in failing to sanction prosecution for unjustifiably not immunizing witness, where government had investigated witness and decided not to grant him immunity because his accounts were self-contradictory and likely to result in perjury. 18 U.S.C.A. § 6003.

**[44] Criminal Law 110 ⇨405.18(2)**

110 Criminal Law
110XVII Evidence
110XVII(L) Statements, Confessions, and Admissions in General
110k405.14 Statements by Third Parties
110k405.18 Statements Against Interest
110k405.18(2) k. Particular cases. Most Cited Cases

Unavailable witness's hearsay confession to a killing was not admissible as a statement against his interest because corroborating circumstances did not "clearly indicate" the trustworthiness of the statement;

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witness contradicted his statement multiple times. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

**[45] Homicide 203 ⇨1181**

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1176 Commission of or Participation in Act by Accused; Identity
203k1181 k. Eyewitness identification. Most Cited Cases

Evidence was sufficient to support defendant's murder conviction; eyewitness testimony placed defendant at the scene of the murder, working with his fellow murderers to locate their victim and acting as a lookout during the murder.

**[46] Criminal Law 110 ⇨1924**

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1924 k. Presentation of witnesses. Most Cited Cases

Defendant made out a colorable claim that trial counsel failed to provide constitutionally adequate assistance in electing not to call sole eyewitness to charged murder; without eyewitness account of the murder and identification of codefendant as the shooter, jury was left to infer who shot victim and to weigh that inference against the testimony of government witnesses that another codefendant, with defendant's assistance, committed the murder and later claimed credit for it. U.S.C.A. Const.Amend. 6.

**[47] Criminal Law 110 ⇨330**

110 Criminal Law
110XVII Evidence
110XVII(C) Burden of Proof
110k326 Burden of Proof
110k330 k. Matters of defense and rebuttal in general. Most Cited Cases

When a defendant raises, by meeting his burden of production, a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense.

**[48] Conspiracy 91 ⇨40.4**

91 Conspiracy
91II Criminal Responsibility
91II(A) Offenses
91k39 Persons Liable
91k40.4 k. Withdrawal. Most Cited Cases

Conspiracy is a crime that presumes continuity until accomplishment or termination, and consequently, once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends; once the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws.

**[49] Conspiracy 91 ⇨44.2**

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k44 Evidence
91k44.2 k. Presumptions and burden of proof. Most Cited Cases

Defendant bore the burden of persuasion to show that he withdrew from charged conspiracy outside of the statute of limitations period.

**[50] Criminal Law 110 ⇨1172.1(4.2)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.1 In General
110k1172.1(2) Particular Instructions
110k1172.1(4.2) k. Law of parties; aiding and abetting, accessories, principals. Most Cited Cases

Even assuming error by the district court in using the "natural and probable consequences" instruction for aiding and abetting charges, given the forfeiture of an argument by defendants that their murder convictions could not be sustained under aiding and abetting theory, the error was not prejudicial in view of the district court's instruction on co-conspirator liability for acts reasonably foreseen as a necessary or natural consequence of the unlawful agreement; any error regarding the "natural and probable consequences" instruction did not seriously affect the fairness, integrity or public reputation of judicial proceedings because evidence supports the jury's verdict on defendants' continuing criminal enterprise (CCE), Racketeer Influenced and Corrupt Organizations Act (RICO), and first-degree murder convictions under the alternative *Pinkerton* theory of liability. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(a, b), 21 U.S.C.A. § 848(a, b).

**[51] Conspiracy 91 €=>41**

91 Conspiracy
  91II Criminal Responsibility
    91II(A) Offenses
      91k39 Persons Liable
        91k41 k. Acts of coconspirators. Most Cited Cases

*Pinkerton* coconspirator liability as an aider and abettor exists, even where the substantive offense is not an overt act alleged in the indictment; it requires only that the substantive offense be committed in furtherance of the conspiracy and reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.

**[52] Criminal Law 110 €=>622.7(3)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k622 Joint or Separate Trials of Codefendants
        110k622.7 Grounds for Severance or Joinder
          110k622.7(3) k. Prejudice; fair trial. Most Cited Cases

District courts have significant flexibility to determine how to remedy any potential risk of prejudice posed by the joinder of multiple defendants in a single trial. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

**[53] Criminal Law 110 €=>622.7(4)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k622 Joint or Separate Trials of Codefendants
        110k622.7 Grounds for Severance or Joinder
          110k622.7(4) k. Conspiracy cases. Most Cited Cases

**Criminal Law 110 €=>622.7(11)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k622 Joint or Separate Trials of Codefendants
        110k622.7 Grounds for Severance or Joinder
          110k622.7(11) k. Disparity in weight of evidence. Most Cited Cases

District court did not abuse its discretion when it declined to sever the trials of movants from that of the other defendants; although movants were alleged to have committed fewer crimes and arguably had a less extensive role in the charged drug conspiracy than the other defendants tried with them, the disparity of evidence did not rise to a level necessary to mandate severance, and facing a death-qualified jury did not compromise a specific trial right of movants. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

**[54] Criminal Law 110 €=>622.7(11)**

110 Criminal Law
  110XX Trial
    110XX(A) Preliminary Proceedings
      110k622 Joint or Separate Trials of Codefendants
        110k622.7 Grounds for Severance or Join-

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der

110k622.7(11) k. Disparity in weight of evidence. Most Cited Cases

Some disparity in evidence against one defendant does not compel severance; rather, when there is substantial and independent evidence of each defendant's significant involvement in the conspiracy, severance is not required. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

**[55] Conspiracy 91 ⟹47(2)**

91 Conspiracy
  91II Criminal Responsibility
    91II(B) Prosecution
      91k44 Evidence
        91k47 Weight and Sufficiency
          91k47(2) k. Circumstantial evidence. Most Cited Cases

Direct evidence of agreement is not required to establish involvement in conspiracy; jury may infer conspiratorial agreement from the circumstances and the defendant's knowledge.

**[56] Conspiracy 91 ⟹47(12)**

91 Conspiracy
  91II Criminal Responsibility
    91II(B) Prosecution
      91k44 Evidence
        91k47 Weight and Sufficiency
          91k47(3) Particular Conspiracies
            91k47(12) k. Narcotics and dangerous drugs. Most Cited Cases

Cooperating co-conspirators provided ample testimony upon which the jury reasonably could infer defendant's knowledge of, and agreement to join, the drug conspiracy; additionally, it was well within reason for the jury to find that murder of marijuana seller was a consequence of a territorial drug dispute associated with the charged conspiracy.

**[57] Criminal Law 110 ⟹1992**

110 Criminal Law
  110XXXI Counsel
    110XXXI(D) Duties and Obligations of Prosecuting Attorneys
      110XXXI(D)2 Disclosure of Information
        110k1992 k. Materiality and probable effect of information in general. Most Cited Cases

Prudent prosecutor will resolve doubtful questions about whether evidence or information is "material" and therefore subject to disclosure under *Brady* in favor of disclosure, particularly where the defendant brings the existence of what he believes to be exculpatory or impeaching evidence or information to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material.

**[58] Criminal Law 110 ⟹1998**

110 Criminal Law
  110XXXI Counsel
    110XXXI(D) Duties and Obligations of Prosecuting Attorneys
      110XXXI(D)2 Disclosure of Information
        110k1993 Particular Types of Information Subject to Disclosure
          110k1998 k. Statements of witnesses or prospective witnesses. Most Cited Cases

**Criminal Law 110 ⟹1999**

110 Criminal Law
  110XXXI Counsel
    110XXXI(D) Duties and Obligations of Prosecuting Attorneys
      110XXXI(D)2 Disclosure of Information
        110k1993 Particular Types of Information Subject to Disclosure
          110k1999 k. Impeaching evidence. Most Cited Cases

Under *Brady*, it was incumbent upon the prosecutor to disclose eyewitness' grand jury testimony to defendant for his use at his murder trial; however, although eyewitness' subsequent trial testimony was inconsistent with, rather than illustrative of, her grand jury testimony on the key point, there was not a reasonable probability that such information could have been used to impeach eyewitness' claim to be an eyewitness to murder such that it would have changed the outcome of the proceeding. U.S.C.A. Const.Amend. 5.

***38** Appeals from the United States District Court for the District of Columbia (No. 1:00–cr–00157).Stephen C. Leckar, appointed by the court, John Kenneth Zwerling, Neil H. Jaffee, Assistant Federal Public Defender, and Charles A. Murray argued the cause for appellants. With them on the briefs were A.J. Kramer, Federal Public Defender, and Deborah A. Persico, appointed by the court.

Leslie Ann Gerardo, Assistant U.S. Attorney, U.S. Attorney's Office, argued the cause for appellee. With her on the brief were Ronald Machen, Jr., U.S. Attorney, Roy W. McLeese III and Elizabeth Trosman, Assistant U.S. Attorneys, and Angela M. Miller, Special Assistant U.S. Attorney.

Before: SENTELLE, Chief Judge, and ROGERS [FN1] and KAVANAUGH, [FN2] Circuit Judges.

FN1. Circuit Judge Rogers concurs in part in Part I, *see infra* concurring opinion, and in part in Part V, *see infra* note 11.

FN2. Circuit Judge Kavanaugh does not join Parts IV.A.1 and IV.A.2.

Opinion for the Court filed PER CURIAM.

Opinion concurring in part in Part I filed by Circuit Judge ROGERS.

PER CURIAM:

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***39** Six defendants appeal from judgments of conviction in the district court on multiple charges, including drug conspiracy, RICO conspiracy, continuing criminal enterprise, murder, and other related charges in violation of federal and District of Columbia laws. They assert a wide variety of alleged errors covering, among other things, evidentiary issues, both as to admission and sufficiency; conduct of the trial; prosecutorial misconduct; and jury instructions. Upon review, we conclude that most of the asserted errors either were not erroneous or were harmless. As to one category of issue involving alleged violations of the Confrontation Clause of the Constitution, a Supreme Court decision intervening between the trial and our consideration of the case compels us to remand convictions of some drug charges (Counts 126–138) for further consideration by the district court in light of the Supreme Court's opinion. We also remand for further proceedings a claim of ineffective assistance of counsel raised by appellant Smith (Counts 4 and 5). We vacate one murder conviction as to appellant Moore that, as the parties agree, merges with another conviction (Count 32).

* * *

According to the indictment in the district court and the evidence of the United States at trial, during the late 1980s and 1990s, appellants Rodney Moore, Kevin Gray, John Raynor, Calvin Smith, Timothy Handy, and Lionel Nunn, along with others, some of whom were also indicted but tried separately, conspired to conduct and did conduct an ongoing drug distribution business in Washington, D.C. In the course of conducting that business, various of the co-conspirators committed a wide-ranging course of violence including 31 murders. The United States obtained a 158–count superseding indictment upon which the defendants were tried by a jury. After a trial lasting over ten months, the jury returned verdicts of guilty on several of the charges, including the drug conspiracy, 21 U.S.C. § 846, the RICO conspiracy, 18 U.S.C. § 1962(d), continuing criminal enterprise (Moore and Gray), 21 U.S.C. § 848(a)-(b), murder, D.C.Code § 22–2401, – 3202; D.C.Code § 22–2101; 18 U.S.C. § 1959(a)(1); 21 U.S.C. § 848(e)(1)(A); 18 U.S.C. § 1512, assault with intent to murder (Moore and Gray), D.C.Code § 22–503, –3202, illegal use of a ***40** firearm (Moore, Gray, Raynor, Handy, and Nunn), 18 U.S.C. § 924(c), distribution of cocaine base and heroin (Gray), 21 U.S.C. § 841(a)(1), possession with intent to distribute heroin (Raynor), *id.*, and tampering with a witness (Handy), 18 U.S.C. § 1512(b). The trial court entered judgment imposing substantial criminal sentences generally amounting to terms in excess of life imprisonment from which the defendants now appeal.

Further details of the facts, evidence, and proceedings will be set forth as necessary for the discussion of the issues raised by appellants.

## I.[FN3]

[1] The Constitution's equal protection guarantee bars prosecutors from using peremptory challenges to strike prospective jurors on the basis of race. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In this case, although 9 of the 12 jurors were African-American, appellants argue that the prosecution unconstitutionally used its peremptory challenges to remove prospective jurors who were African-American. The district court rejected appellants' challenge. We affirm the district court's decision.

A *Batson* challenge proceeds in three steps: *First,* the defendant must establish "a *prima facie* case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial." *Second,* "the State [must] come forward with a neutral explanation for challenging jurors within an arguably targeted class." *Third,* the "trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Miller–El v. Dretke,* 545 U.S. 231, 239, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (alterations and internal quotation marks omitted). In the district court, appellants argued that the prosecution's use of 34 peremptory strikes to remove African–Americans from the venire for regular jurors established a *prima facie* case of discrimination. Accepting that the *prima facie* hurdle was cleared, the district court required the prosecution to explain each of its peremptory challenges of African–Americans. After the prosecution provided those explanations, the district court required further argument from both sides as part of *Batson*'s final stage. The court allowed the defense counsel to dispute the validity of each government explanation and required the prosecution to individually respond to the defense's argument on each disputed strike. The court actively engaged in the entire process, consulting its notes and correcting and questioning counsel. At the conclusion of the multi-hour hearing, the district court ruled that appellants had not "established purposeful discrimination." *Miller–El,* 545 U.S. at 239, 125 S.Ct. 2317; *see also Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

In this court, appellants dispute the district court's conclusion that there was no *Batson* violation.

### A.

[2] Appellants' challenge to the district court's *Batson* decision faces a demanding standard. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *41 *Snyder v. Louisiana,* 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). The Supreme Court has emphasized that the "trial court has a pivotal role in evaluating *Batson* claims." *Id.* The Court has explained that the demeanor of the prosecutor exercising a challenged strike is often "the best evidence of discriminatory intent." *Id.* (alterations omitted). The district court, unlike this court, observed the prosecutor's demeanor firsthand. Further, when the asserted basis for a strike is a prospective juror's behavior in court, the trial court will have observed and evaluated that juror's demeanor as well. *See id.* For those reasons, the Supreme Court has stated that "in the absence of exceptional circumstances, we would defer to the trial court" in resolving a *Batson* claim. *Id.* (alterations omitted); *see also Hernandez v. New York,* 500 U.S. 352, 365–66, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion).

[3] Appellants argue that we should reject the district court's findings because the court itself did not individually discuss each challenged strike on the record. *Batson*'s third step requires trial courts to closely analyze the prosecutor's proffered reason for each disputed

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FN3. Circuit Judge Rogers filed a separate opinion concurring in part in Part I.

strike in light of all the relevant circumstances. *See Miller–El,* 545 U.S. at 241–42, 251–52, 125 S.Ct. 2317. The record here demonstrates that the district court appropriately exercised its *Batson* responsibilities. The district court required three rounds of argument on each strike of an African–American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument. Throughout the hearing, the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel. The district court then concluded, based on the arguments and its personal observation of the prosecutors and of the prospective jurors' demeanor, that the government's race-neutral explanations were genuine. Appellants cite no controlling precedent requiring a trial court to render its decision in a strike-by-strike format. Given the obvious thoroughness of the district court's application of *Batson*'s third step, we cannot conclude that the lack of strike-specific findings creates the sort of "exceptional circumstances" that would overcome our deference to the trial court. *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203.

Moreover, the circumstances of this case seriously undermine appellants' claim. Nine of the 12 jurors seated in this case were African–American. That jury composition mirrored the make-up of the venire, which contained 68 African–Americans out of 90 persons in the pool from which regular jurors were selected. Thus, while the prosecution used many strikes to remove prospective African–American jurors, that is largely explained by the fact that the jury pool was predominately African–American. In addition, the prosecutor's strikes did not skew the racial composition of the resulting jury. The circumstances here are a far cry from the facts of cases in which the Supreme Court has found a *Batson* violation. *Cf. Snyder,* 552 U.S. at 476, 128 S.Ct. 1203 (all African–Americans in jury pool struck by prosecution); *Miller–El,* 545 U.S. at 240–41, 125 S.Ct. 2317 (10 of 11 African–Americans in jury pool after dismissals for cause or by agreement struck by prosecution); *Batson,* 476 U.S. at 100, 106 S.Ct. 1712 (all African–Americans in jury pool struck by prosecution).

Finally, in this case there are no extrinsic indicators of racial discrimination of the kind found in successful *Batson* challenges. For example, in *Miller–El,* a case in which the trial occurred before the 1986 *Batson* decision, the Court relied in part on the *42 "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries." *Miller–El,* 545 U.S. at 253, 125 S.Ct. 2317. In contrast, the Supreme Court has explained that cases where the stricken jurors are the same race as the majority of victims and prosecution witnesses are unlikely candidates for a finding of racial discrimination. *See Hernandez,* 500 U.S. at 369–70, 111 S.Ct. 1859 (plurality opinion). The overall facts and circumstances of this case thus do not support appellants' claim of intentional discrimination. *See Snyder,* 552 U.S. at 478, 128 S.Ct. 1203 ("[I]n reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.").

### B.

[4] Although the circumstances of this case strongly suggest that the prosecution did not use its peremptory strikes to discriminate on the basis of race, those facts alone are not dispositive. The dismissal of even a single prospective juror on the basis of race violates equal protection principles. *See Snyder,* 552 U.S. at 478, 128 S.Ct. 1203. We therefore review each of the 11 strikes challenged by appellants. *Cf. Bond v. Beard,* 539 F.3d 256, 270 (3d Cir.2008) (finding overall circumstances suggest no *Batson* violation, but nonetheless conducting analysis of each strike to resolve *Batson* claim).

[5] Of the 11 strikes challenged on appeal, appellants objected to the following seven strikes in the district court. We review the district court's findings on those seven strikes for clear error. *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203. Because the district court empanelled an anonymous jury in this case, we identify each prospective juror using the numbers assigned by the district court.

**2932:** Among its concerns about this prospective juror, the prosecution noted 2932's statement that long delays in bringing criminal cases to trial impaired witnesses' memories. The prosecution worried that 2932 would be suspicious of the government's case because this case involved long delay and the government was relying on witnesses' memories of long-past events. Appellants do not rebut the plausibility of that specific, race-neutral objection or show that any other seated juror worried about the effect of delay on witnesses' memories.

**3559:** The prosecution explained that it struck 3559 on the basis of his youth. The government's statement that it struck every juror age 22 or younger, regardless of race, remains unrebutted.

**3872**: The prosecution stated that it struck 3872 for appearing disrespectful in court. Appellants cite trial transcripts in an attempt to demonstrate that seated white jurors *might* have behaved just as inappropriately. This is an instance in which "[a]ppellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision." *Rice v. Collins,* 546 U.S. 333, 343, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (Breyer, J., concurring); *see Snyder,* 552 U.S. at 483, 128 S.Ct. 1203. We cannot tell from the record whether there was anything inappropriate about those seated jurors' demeanors. And contrary to appellants' assertion, *Snyder* does not establish a rule that trial courts must make specific findings about demeanor. *Cf. Thaler v. Haynes,* — U.S. ——, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010). Because appellants have not demonstrated any "exceptional circumstances" that require otherwise, we defer to the district court's finding on an issue that is "peculiarly within a trial judge's province." *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203.

***43 4463**: The prosecutor explained that 4463 appeared unstable in court and that "his voir dire indicated numerous answers that would make clear why the government opposes this juror." May 7, 2002 PM Tr. at 75. A quick review of 4463's rambling statements, in which he detailed how his brother had been unfairly framed for distribution of crack cocaine, makes clear why a prosecutor would want to strike 4463, regardless of race. Appellants' citation to a seated white juror whose family also had drug problems is not comparable. That juror calmly related the long-past problems of his relatives, and expressly stated that his brother had been dealt with fairly.

**4730:** The government claims to have struck 4730 in part because 4730 was suspicious of law enforcement and unsure that the death penalty should apply in Washington, D.C. Appellants question the strength of 4730's views on this subject, but they point to no seated juror who expressed reservations about law enforcement similar to 4730's concern about "rogue police officers," and a "bad experience" with law enforcement that "[l]eft a bad taste." Apr. 5, 2002 PM Tr. at 23–24. 4730's views on law enforcement provided a race-neutral explanation for the prosecution's decision to strike her.

**5698:** This prospective juror was a former special police officer whom the prosecutor claimed to have struck for being "quiet," "submissive," and possibly not "strong enough" to be an effective juror. May 7, 2002 PM Tr. at 42. To the extent we can discern demeanor from a written transcript, 5698's colloquy with the district court suggests a passive, uncertain, and quiet person. And passivity can be a plausible, race-neutral reason to exclude a juror. *See United States v. Changco,* 1 F.3d 837, 840 (9th Cir.1993). Appellants may be correct that former law enforcement officers are often desirable jurors from the prosecution's perspective. But that does not bar the prosecution from dismissing any particular juror because the government believes her personality would make her a less than desirable juror from the prosecution's perspective.

**5773:** The prosecution claimed to have struck 5773 due to 5773's concerns about imposing the death penalty. Appellants respond that seated white jurors appeared equally hostile to the death penalty. We disagree. As to the seated white juror whose views come closest to matching 5773's, he repeatedly followed questions about his ability to impose the death penalty with notations such as "I would try to abide by the Court's instruction, not my personal belief." By contrast, 5773's doubts about the death penalty were sufficiently salient that he used his questionnaire to indicate that he had concerns about his ability to be a fair juror. The prosecution thus had legitimate grounds to suspect that 5773 would be significantly more hesitant to impose the death penalty than the seated white juror.

In the district court the defense did not object to the prosecution's strike of the following four prospective jurors. The district court's rulings on these strikes are therefore reviewed only for plain error. *See, e.g., United States v. Charlton,* 600 F.3d 43, 50 (1st Cir.2010).

**866:** The prosecution explained that it struck 866 because 866 "had a relative who had been convicted of murder." May 7, 2002 PM Tr. at 35. The record shows that 866's nephew, with whom she was personally close, murdered his wife and was then imprisoned, where 866 believes he was abused by his guards. Appellants' attempts to minimize the potential effect of 866's experiences with murder convictions and to draw comparisons to seated jurors ***44** who had relatives convicted of much less serious crimes are not convincing.

**2486:** The prosecution struck 2486 "based on things she said about her prior jury service ... as well as other statements in her questionnaire." May 7, 2002 PM Tr. at 39. 2486's questionnaire and the transcript of what she said during *voir dire* refer to her participation in an acquittal during her prior jury service, which she attributed to the prosecution's lack of direct evidence. The record also demonstrates 2486's reticence to impose the death penalty and suspicion of law enforcement competence. Appellants now contend that the prosecutor's mere reference to 2486's statements and questionnaire responses is too vague to qualify as a credible, race-neutral explanation. But the prosecution had no reason to give a more detailed explanation, because appellants did not question this strike in the district court. Given that the record referenced by the prosecutor does in fact reflect an objective basis for the prosecutor's proffered explanation, we cannot say that the district court plainly erred in finding no racial motivation for this strike.

**3143:** The prosecution claims that it struck 3143 because 3143 demanded a higher standard of proof to impose the death penalty and was generally hostile to the death penalty. On appeal, appellants offer a lengthy comparison of 3143's views to those of seated white jurors. The government attempts—with considerable success—to distinguish the seated jurors' views from 3143's, but the government also has a more telling point: It is difficult to say that the district court plainly erred in not noticing similarities between those seated jurors and 3143, given that none of the six defendants' lawyers noticed those similarities during jury selection. We reject appellants' challenge to the prosecution strike of 3143.

**3505:** The prosecution explained its strike of 3505 based on 3505's statements in her questionnaire and during *voir dire* that the death penalty is "never justified." Appellants do not argue either that the prosecution's explanation is false or that other seated jurors had the same views. Appellants argue only that 3505 also claimed to be able to set her personal views aside. That in no way implies that the prosecutor considered race in striking 3505. This challenge could not succeed under any standard of review, much less under plain error review.

In short, appellants have failed to sufficiently undermine the government's race-neutral explanations for its peremptory strikes of prospective African–American jurors. Moreover, the circumstances of this case strongly suggest that the prosecution did not discriminate on the basis of race. Especially given the deferential standard under which we review challenges to the district court's decisions on this issue, we reject appellants' *Batson* claims.

## II.

A week before trial began, the government filed a motion requesting that the district court order appellants to wear stun belts during trial. Gray filed written opposition to the motion and, at a pretrial hearing five days later, all appellants opposed the motion orally. Feb. 27, 2002 PM Tr. at 36–52. The court granted the government's motion, *id.* at 57, and issued a memorandum opinion in support of its order, *see United States v. Gray,* 254 F.Supp.2d 1 (D.D.C.2002). Appellants contend that the district court violated their due process rights when it ordered them to wear stun belts at trial.

The right to a fair trial is a fundamental liberty secured by the due process guarantee***45** of the Fifth and

Fourteenth Amendments. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Invoking this fair trial right, the Supreme Court has stated that certain government practices during criminal trials prejudice defendants because they offend three "fundamental legal principles," *Deck v. Missouri,* 544 U.S. 622, 630, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005): (1) that "the criminal process presumes that the defendant is innocent until proved guilty," *id.*; (2) that "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel," *id.* at 631, 125 S.Ct. 2007; and (3) that "judges must seek to maintain a judicial process that is a dignified process," *id.* When a government practice is prejudicial because it either inherently or in a particular defendant's case offends these principles, the Court has forbidden district courts from utilizing the practice unless it is justified by an essential state interest, such as courtroom security or escape prevention, specific to the defendant on trial. *See, e.g., Deck,* 544 U.S. 622, 125 S.Ct. 2007; *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *Estelle,* 425 U.S. 501, 96 S.Ct. 1691.

Accordingly, the Supreme Court has held it is inherently prejudicial to require a criminal defendant to wear jail garb during trial and therefore, because no state interest is ever served by the practice, it violates his fair trial right. *See Estelle,* 425 U.S. at 505, 512–13, 96 S.Ct. 1691. Similarly, the Court has held that visibly restraining a criminal defendant during either a criminal trial or the penalty phase of a capital prosecution is inherently prejudicial and thus is permissible only when justified by an essential state interest specific to the defendant. *See Deck,* 544 U.S. at 629, 125 S.Ct. 2007. In contrast, the Court has held that deployment of security personnel in a courtroom is not inherently prejudicial, and is thus permissible, regardless of the state interest served, as long as it is not actually prejudicial in a particular case. *See Holbrook,* 475 U.S. at 568–69, 572, 106 S.Ct. 1340.

[6] Applying these lessons to the case before us, if the use of stun belts to restrain criminal defendants at trial either is inherently prejudicial or in this case was actually prejudicial to the defendants, the district court had the obligation to determine whether the belts were justified by an essential governmental interest specific to the defendants on trial. Appellants, who argue that stun belts are inherently prejudicial, contend that the district court failed to meet this obligation for three reasons. First, they assert that the district court failed to make an individualized determination of whether a stun belt was needed to restrain each defendant. Second, they argue that the district court was required but refused to hold an evidentiary hearing to resolve factual disputes they raised concerning the visibility of, necessity for, and alternatives to the stun belts. Finally, appellants maintain that the district court erroneously failed to consider how the stun belts would affect appellants' right to communicate with counsel and assist in their own defense. On review, we hold that, even assuming that stun belts are inherently or were actually prejudicial, the district court did all that was required of it.

In review of a district court's authorization of an inherently or actually prejudicial governmental practice, we find error only when the district court has abused its discretion. *See Deck,* 544 U.S. at 629, 125 S.Ct. 2007 ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial ***46** court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial."); *United States v. Wardell,* 591 F.3d 1279, 1293 (10th Cir.2009); *United States v. Durham,* 287 F.3d 1297, 1304 (11th Cir.2002).

It is true, as appellants say, that prior to authorizing the use of an inherently or actually prejudicial government practice, the district court must consider each defendant before him and determine whether the practice serves an essential interest in the particular trial at hand. *Deck,* 544 U.S. at 624, 633, 125 S.Ct. 2007; *Holbrook,* 475 U.S. at 568–69, 106 S.Ct. 1340. However, the district court did just this. In a memorandum opinion, the court carefully analyzed the following factors in its decision to require stun belts:

> 1) the seriousness of the crimes charged and the severity of the potential sentences; 2) the numerous

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allegations of threats of violence made by the defendants against witnesses; 3) previous guilty pleas or convictions of a substantial number of the defendants to prior gun charges and/or violent crimes; 4) allegations of gang activity, and the likelihood that associates or rivals of the alleged gang may be present at the trial; 5) the opinion of the U.S. Marshal for this District, particularly as it relates to knowledge of security in this courthouse and of cases of this nature; 6) potential prejudice to the defendants from the use of the stun belts; 7) likelihood of accidental activation of the stun belts; 8) potential danger to the defendants if the belts are activated; 9) the availability and viability of other means to ensure courtroom security; 10) the potential danger for the defendants and others present in the courtroom if other means are used to secure the courtroom; and 11) the existence of a clear written policy governing the activation of stun belts worn by defendants.

*Gray,* 254 F.Supp.2d at 4. Finding that "[e]ach of the eleven factors" militated in favor of imposing stun belts, the district court concluded that the use of stun belts would "best preserve ... the security of the courtroom." *Id.* at 4–6.

The district court's memorandum opinion demonstrates that it considered the security concerns presented by the particular defendants at trial before making the determination that stun belts were appropriate. It thoroughly examined factors relevant to each defendant and, in the exercise of its broad discretion, made a determination based on those factors. That appellants shared many of the same characteristics (e.g., they were charged in the same conspiracy, they all faced either the death penalty or life sentences) does not mean the district court failed to consider them individually. And that the district court reached a result with which the defendants disagree does not mean it abused its discretion.

[7] We also reject appellants' contention that the district court was obligated to hold an evidentiary hearing. When making the discretionary decision whether to authorize an inherently or actually prejudicial government practice at trial, "[a] formal evidentiary hearing may not be required, but if the factual basis for the extraordinary security is controverted, the taking of evidence and finding of facts may be necessary." *United States v. Therlault,* 531 F.2d 281, 285 (5th Cir.1976); *cf. United States v. Law,* 528 F.3d 888, 903–04 (D.C.Cir.2008); *United States v. Microsoft Corp.,* 253 F.3d 34, 101 (D.C.Cir.2001) (holding that district courts are not required to conduct evidentiary hearings prior to issuing relief in civil cases when "there are no disputed factual issues regarding the matter of relief"). Although ***47** the defense pointed out that due to the short notice of the hearing the evidence before the district court about how stun belts functioned was provided entirely by the government and there had "to be another side of the story with respect to the proffers that [the government has] made," appellants did not allege any specific inaccuracy or misrepresentation. Feb. 27, 2002 PM Tr. at 44–46. While appellants disputed the government's contention that other measures would be inadequate to secure the courtroom, *id.* at 49, this dispute is, in essence, the ultimate question the district court must answer. *See Durham,* 287 F.3d at 1304 ("[A] decision to apply leg shackles to the defendant 'must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.' " (quoting *Elledge v. Dugger,* 823 F.2d 1439, 1451 (11th Cir.1987) (per curiam))). Appellants must make a more specific factual challenge.

The only specific factual matter relevant to the district court's determination about which the government and appellants meaningfully disagreed was whether the stun belts would be visible. Feb. 27, 2002 PM Tr. at 38, 44, 56–57. However, in its memorandum opinion, the court accepted appellants' contention that there was *some* risk the stun belts would be visible. The court then specifically ordered precautions to reduce the visibility of the belts. The opinion states: "Although the Court does not believe that it is likely that any juror will see the stun belts, the Court will take precautions to minimize prejudice to the defendants. The defendants will be brought into the courtroom before the jury is brought in, and will be escorted from the courtroom after the jury

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has left." *Gray,* 254 F.Supp.2d at 4. Under these circumstances, we hold that the district court acted within its discretion when it declined to hold an evidentiary hearing.

Turning to appellants' claim that the district court erred by not considering the effect of stun belts on appellants' ability to confer with their counsel and participate in their defense, we again find no error. As discussed above, whether wearing a stun belt affects a criminal defendant's ability to confer with counsel and participate in his defense is one of the three questions relevant to the determination of whether, before authorizing such a restraint, a district court must first determine whether it is justified by an essential governmental interest specific to the defendant on trial. When the district court made the appropriate findings to determine that the use of stun belts was so justified in appellants' case, the court implicitly assumed that the belts did risk negatively affecting appellants' abilities in this way. It was not required to revisit this question in its substantive decisionmaking process. We also note that while appellants direct us to case law that warns abstractly of the potential harm of stun belts, *see, e.g., Durham,* 287 F.3d at 1305–06, they have offered us no evidence stun belts in any way affected their communication with their counsel or their participation in their defense.

Moore also repackages appellants' arguments that the district court abused its discretion by authorizing stun belts into an objection to the court's refusal to grant his post-trial motion for a new trial. Before the district court Moore argued that he was entitled to a new trial because "a sufficient factual predicate did not exist" to justify the district court's authorization of stum belts. Def. Moore's Mot. for New Trial at 2 (June 8, 2003). He also maintained that a new trial was warranted because his stun belt was activated, outside the presence of the jury. On appeal, ***48** Moore argues that he was physically and psychologically injured by the activation of the stun belt and that these injuries interfered with his ability to communicate with his attorney and assist in his own defense.

Moore's stun belt was activated on November 12, 2002, while trial was ongoing but before trial had started on that day. Nov. 12, 2002 AM Trial Tr. at 8. Defense counsel reported the incident to the court and asked the court to consider taking a break. *Id.* at 97. The court did so and, after reconvening, announced that it had asked a nurse to examine Moore and that the nurse had reported that Moore "fe[lt] that the use of the device was unjustified," but that he was "physically ... all right" and "was willing to go forward today." *Id.* at 98. Moore's counsel did not challenge these representations or otherwise object further. *Id.*

We reject Moore's claims. That Moore's stun belt was activated does not undermine the district court's reasoned decision, which we have upheld, to require him to wear a stun belt. Insofar as Moore now claims that the district court violated his constitutional rights not by requiring him to wear the belt but by continuing the trial after the belt's activation, we again find no error. As noted, the district court acceded to the request for a break by Moore's counsel, who never disputed the representation by the nurse, who had examined Moore, that Moore was ready to proceed with the trial.

## III.

[8] Appellants contend that the district court erred in empaneling an anonymous jury insofar as the prospective jurors' names, addresses, and places of employment were withheld. Our review is for abuse of discretion, despite appellants' contention that the *de novo* standard applies because "constitutional principles are involved." Appellants' Br. at 73. The court rejected this view in *United States v. Childress,* 58 F.3d 693 (D.C.Cir.1995), a case concerning (in part) whether "the use of anonymous juries violates the *Constitution,*" *id.* at 702 (emphasis added), because "[d]ecisions on ... anonymity require a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings," *id.*

[9][10] In *United States v. Edmond,* 52 F.3d 1080 (D.C.Cir.1995), the court advised that "[i]n general, the [district] court should not order the empaneling of an anonymous jury without (a) concluding that there is a strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any pre-

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judicial effects on the defendant and to ensure that his fundamental rights are protected." *Id.* at 1090 (first alteration in original) (citation and quotation marks omitted). In determining whether such protection is warranted, the court has found its analysis aided by five factors identified by the Eleventh Circuit:

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

*Id.* at 1091 (quoting *United States v. Ross,* 33 F.3d 1507, 1520 (11th Cir.1994)). Finding that all five factors were satisfied here, the district court granted the government's*49 motion for an anonymous jury. As justification, the district court noted that appellants were charged in the superseding indictment with participating in a drug and RICO conspiracy that involved multiple acts of violence using firearms, in addition to threatening potential witnesses and preventing individuals from cooperating with law enforcement, and that if convicted appellants faced the maximum penalty of death or life imprisonment. Pointing to two *Washington Post* articles, the district court noted that this case had garnered media attention capable of increasing the potential danger to jurors. *See United States v. Gray,* No. 00–cr–157, at 12–13 (D.D.C. Feb. 7, 2002) (resolving pretrial motions).

Appellants challenge the district court's decision to empanel an anonymous jury on three grounds. None is persuasive. First, appellants maintain that the district court's decision was unfounded because the superseding indictment did not allege any history of juror intimidation. This argument misunderstands and too narrowly construes the requirements set forth in *Edmond.* As the court explained, "we do not believe such evidence [of jury tampering] is necessary in every case. Rather, we think the District Court ... reasonably could have ascertained a threat to jurors from the charges in the indictment." *Edmond,* 52 F.3d at 1091. Here, the particular allegations of "multiple acts of violence to prevent individuals from contacting law enforcement," *Gray,* No. 00–cr–157, at 13 (Feb. 7, 2002), were sufficient, viewed in context, for the district court to be concerned about appellants' capacity to harm jurors and interfere with the judicial process. *See Edmond,* 52 F.3d at 1091–92. As support, the district court cited the factual findings set forth in its November 15, 2001 memorandum regarding appellants' history of interfering with the judicial process, in resolving various discovery and evidentiary disclosure requests. *See United States v. Gray,* No. 00–cr–157, at 5–12 (D.D.C. Nov. 15, 2001).

Second, appellants maintain that media interest in this criminal prosecution would not endanger jurors' safety. The district court identified two *Washington Post* articles covering appellants' case as a prosecution brought against "Murder, Inc." Both articles appeared on the front page of the Metro section and described the number of alleged murders as historic and unprecedented. Such evidence of "initial media interest," *United States v. Wilson,* 160 F.3d 732, 746 (D.C.Cir.1998), in a high-profile prosecution of a major drug conspiracy involving multiple defendants over a substantial period of time and alleged purposeful and random acts of murder supports the district court's decision.

Third, appellants suggest that the district court failed to take reasonable precautions to minimize any potential prejudice to them as a consequence of juror anonymity. In granting the motion for an anonymous jury, the district court advised that it would "use a questionnaire and extensive voir dire to examine the jurors' backgrounds" and, in addition to instructing jurors that appellants were presumed innocent until proven guilty, "provide a neutral explanation to the jurors regarding their anonymity." *Gray,* No. 00–cr–157, at 13 (Feb. 7, 2002). These precautions were, in fact, taken. A combination of instructions downplaying the significance of jurors' anonymity and a lengthy *voir dire* questionnaire can adequately safeguard a defendant's fundamental rights. *See, e.g., Childress,* 58 F.3d at 701–02; *Edmond,* 52 F.3d at 1092–93. Here the neutral instruction, set forth in the jury questionnaire,*50 [FN4] informed jurors

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that they would meet at specific locations to be escorted to and from the courthouse "for [their] convenience as well as to assure both the government and the defense that no one has attempted to contact, communicate, or influence the jury." For *voir dire*, the 46-page jury questionnaire—at least double the length of the jury questionnaires that passed muster in *Childress* and *Edmond*—provided appellants with "a broad variety of personal information, including the quadrant of the city in which jurors resided, their educational history, marital status, military service, employment status and work description, their spouse's and children's employment, and their experience with crime, drugs, and law enforcement." *Edmond*, 52 F.3d at 1092. This sufficed "to compensate for the information denied by juror anonymity" because "[i]t elicited information ... far more extensive and detailed than the generalizations appellants might have drawn from jurors' mere names and addresses." *Id.* Appellants have pointed to no particular example of prejudice.

> FN4. Although appellants note in the "background" section of their brief that the district court's instruction was not given orally or repeated during the trial, appellants do not pursue this issue in their argument section. We therefore have no occasion to consider whether a written instruction that is not orally repeated thereafter would alone be an adequate safeguard. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C.Cir.2008); FED. R.APP. P. 28(a)(9).

Accordingly, we hold that the district court, having made the necessary findings under the *Edmond* factors, did not abuse its discretion in granting the government's motion for an anonymous jury.

## IV.

Appellants raise numerous claims of prosecutorial misconduct, including inflaming the passions and prejudices of the jury, vouching for and bolstering the credibility of witnesses, soliciting testimony to that effect, denying appellants a presumption of innocence through elicitation of improper opinion testimony, and violating appellants' Sixth Amendment right by introducing evidence that they associated with and often sought the advice of legal counsel.[FN5] We have reviewed these claims and limit our discussion to those having arguable merit, and concluded that even when appellants' claims are viewed cumulatively, they fail to show a violation of their due process rights as would entitle them to a new trial.

> FN5. Appellants also incorporate their arguments relating to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the federal bribery statute, 18 U.S.C. § 201(c)(2), which are addressed in Parts VI and XII, respectively.

### A.[FN6]

> FN6. Circuit Judge Kavanaugh does not join Parts IV.A.1 and IV.A.2.

[11][12][13] *Opening and Closing Arguments.* Appellants contend that the prosecutor's opening argument to the jury was improper and substantially prejudiced the trial proceedings by interfering with the jury's ability to properly assess the evidence. Our review of allegedly improper prosecutorial arguments is for substantial prejudice where the defendants lodged an objection, but we apply the plain error standard where they failed to object. *See United States v. Small*, 74 F.3d 1276, 1281 (D.C.Cir.1996); *see also United States v. Catlett*, 97 F.3d 565, 573 (D.C.Cir.1996). When, as here, the alleged prosecutorial misconduct forms the basis for an unsuccessful motion for a mistrial, our review of the district court's denial of that motion is for abuse of discretion. *See Small*, 74 F.3d at 1284. This court has identified ***51** three factors that guide the determination whether improper remarks in closing and opening statements prejudiced a defendant so as to warrant reversal, under either the substantial prejudice or plain error standard: "(1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the error's effects." *United States v. Becton*, 601 F.3d 588, 598 (D.C.Cir.2010); *see also United States v. Gartmon*, 146 F.3d 1015, 1026 (D.C.Cir.1998). In addition, this court will presume "that a jury acts with common sense and discrimination

when confronted with an improper remark from a prosecutor and owes deference to the district court's assessment of such a statement's prejudicial impact on the jury." *United States v. Childress*, 58 F.3d 693, 716 (D.C.Cir.1995) (citation and internal quotation marks omitted).

[14] The Supreme Court has described the federal prosecutor as occupying a position of public trust:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *accord Taylor v. United States*, 413 F.2d 1095 (D.C.Cir.1969). It follows from this rigorous standard that, in making opening and closing arguments, a prosecutor has an obligation "to avoid making statements of fact to the jury not supported by proper evidence introduced during trial," even when the misstatements are made in good faith. *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C.Cir.1969). Equally well settled, "[a] prosecutor may not make comments designed to inflame the passions or prejudices of the jury." *United States v. Johnson*, 231 F.3d 43, 47 (D.C.Cir.2000); *see Childress*, 58 F.3d at 715. These general principles apply to, and inform the particular function of, the government's opening and closing arguments in a criminal trial.

[15] 1. "The purpose of an opening statement is to provid[e] background on objective facts while avoiding prejudicial references," and hence "[t]he prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to poison the jury's mind against the defendant or to recite items of highly questionable evidence." *United States v. Thomas*, 114 F.3d 228, 247 (D.C.Cir.1997) (alterations in original) (citations and internal quotation marks omitted). So understood, prosecutorial misconduct exists where the government's argument touches upon facts prejudicial to the defendant that the government fails to support by admissible evidence at trial. *See Small*, 74 F.3d at 1283. On the other hand, a prosecutor's reference in opening argument to the defendants as "two armed gunmen driving through the streets of D.C., armed to the teeth, dressed for action, carrying a load of dope," although strong and vivid, was not ***52** prosecutorial misconduct because the statement was supported by ample evidence introduced at trial. *United States v. Moore*, 104 F.3d 377, 390 (D.C.Cir.1997).

The prosecutor's opening argument appears to have improperly departed from the standard in *Berger* and applied to opening arguments by this court. As in *Small*, 74 F.3d at 1283, it appears "the prosecutor came close to the line ... in several instances and crossed it in others." For example, appellants were charged with committing 31 murders, and the prosecutor's repeated use of the word "execute" at the start of the trial seems to run afoul of the concern expressed by the court in *United States v. Jones*, 482 F.2d 747, 753 (D.C.Cir.1973), in stating the court could "not condone" the prosecutor's reference during closing argument to the defendant as an "executioner." More generally, the opening argument includes a number of instances where the prosecutor went beyond merely providing an "objective summary of the evidence." *Thomas*, 114 F.3d at 248 (citation and quotation marks omitted). Such statements referring to the murdered victims as "[w]here there once was face and life, now there is nothing but empty black space.... Where there once was life, now there's death," May 9, 2002 PM Trial Tr. at 113, are neither based on evidence nor free from innuendo. Rather, they attempt to appeal to the jury's emotions by dramatic effect. *See Childress*, 58 F.3d at 715. Although other statements listing the 31 murder victims by names and dates on which they were killed are grounded in admissible evidence that the government intended to introduce at trial, this evidentiary nexus became tenuous once the prosecutor began discussing the victims' first days of school, favorite songs, families, mothers, fathers, coffins, and funerals. *Cf. United States v. Dominguez,* 835 F.2d 694, 700 (7th Cir.1987). Indeed, the district court recognized that although the prosecutor's opening argument "was fairly factually stated" it contained "some hyperbole," May 9, 2002 PM Trial Tr. at 127, a disfavored technique, *see United States v. North,* 910 F.2d 843, 895 (D.C.Cir.1990); *United States v. Bouck,* 877 F.2d 828, 831 (10th Cir.1989); *Dominguez,* 835 F.2d at 701.[FN7] Although the government is not required to make its opening argument in a rote manner, the court has admonished that "an opening statement to the jury should be carefully phrased to avoid overstatement." *Thomas,* 114 F.3d at 248. It is the government's opportunity to present the jury with argument based "on *objective* facts *while avoiding prejudicial references.* " *Id.* at 247 (emphases added) (citation and quotation marks omitted).

[16] 2. "The sole purpose of closing argument is to assist the jury in analyzing the evidence," and hence courts have recognized that the prosecutor (as well as defense counsel) is afforded some leeway in "stat[ing] conclusions drawn from the *53 evidence," *United States v. Bailey,* 123 F.3d 1381, 1400 (11th Cir.1997) (citation and quotation marks omitted); *see also Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.7(b) (3d ed.2007). "[I]n closing argument counsel may not refer to, or rely upon, evidence unless the trial court has admitted it." *United States v. Maddox,* 156 F.3d 1280, 1282 (D.C.Cir.1998); *see also Small,* 74 F.3d at 1280. But the prosecutor may, for instance, draw inferences from evidence that support the government's theory of the case so long as the prosecutor does not intentionally misrepresent the evidence. *See United States v. Deloach,* 530 F.2d 990, 1000 (D.C.Cir.1975). Indeed, the prosecutor "may strike hard blows," but not "foul ones." *Berger,* 295 U.S. at 88, 55 S.Ct. 629. Because the line between permissible and impermissible arguments will not always be clear, the inquiry is necessarily contextual. *See Catlett,* 97 F.3d at 572; *Deloach,* 530 F.2d at 999–1000.

Some statements by the prosecutor during closing argument appear problematic. Illustrative is the prosecutor's invitation for the jurors to "imagine Scott Downing," one of the murder victims, in "the last few minutes of [his] life." The prosecutor told the jury:

> Scott Downing is bound with duct tape. It's pitch black in the back of that U-haul. He does not know what's going to happen to him. He must—he must wonder if he's going to live through this night.... He's taken out of that U-haul. He tries to talk but he can't. All he can do is mumble. He feels the grass under his body. He feels the gravel of the road.... And then a gun is placed to the back of his head and two bullets.

Nov. 21, 2002 AM Trial Tr. at 112–13. On appeal, the government responds, in a footnote, that this narrative "had sympathetic overtones" only "[a]t a superficial level" because the jury heard evidence that Downing had been kidnapped, bound and gagged, and shot by the

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FN7. At the conclusion of the prosecutor's opening statement, the district court *sua sponte* instructed the jury, as it had at the outset of the trial, that

> the statements of the lawyers aren't evidence. They're intended to help you follow the evidence when the evidence is introduced. The defendants deny these charges, and you should keep an open mind until after you've heard all the evidence and I give you my final instructions on the law.

May 9, 2002 PM Trial Tr. at 114 (paragraph break omitted). The district court then denied appellants' oral motions for a mistrial. It explained that the jury instruction "takes care of any other problems" and that it "didn't find the opening to be inflammatory in the sense that defense counsel saw it ... but, rather, was fairly factually stated with some hyperbole." *Id.* at 127.

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side of the road. Appellee's Br. at 96 n. 68. This response, however, misses the fundamental distinction between permissible and impermissible closing arguments. In summarizing evidence supporting conviction, a prosecutor may not take artistic license with the trial evidence, construct a more dramatic version of the events, provide conjecture about a victim's state of mind, and then defend against a prosecutorial misconduct claim by maintaining the statements are "fact—based." Sensationalization, loosely drawn from facts presented during the trial, is still a "statement[ ] of fact to the jury not supported by proper evidence introduced during trial," *Gaither,* 413 F.2d at 1079, clearly "designed to inflame the passions or prejudices of the jury," *Johnson,* 231 F.3d at 47. Although not as egregious as comparing appellants to Hitler, as occurred in *North,* 910 F.2d at 895, there are, as every prosecutor knows, limits to striking "hard blows," *Berger,* 295 U.S. at 88, 55 S.Ct. 629.

[17] 3. Nonetheless, assuming, as appellants contend, that prosecutorial misconduct occurred during the arguments to the jury, it did not substantially prejudice appellants. Although the specific arguments to which appellants object appeared at times to address central issues in the case, there was overwhelming evidence of appellants' guilt of the crimes implicated by the prosecutor's purported misconduct, and the district court gave general limiting instructions on the arguments of counsel to the jury at the beginning of the trial, after the prosecutor's opening argument, and during the final instructions to the jury *54 before it began deliberating. *See Thomas,* 114 F.3d at 249; *Gaither,* 413 F.2d at 1079

.

Appellants' reliance on *United States v. Moore,* 375 F.3d 259 (3d Cir.2004), is misplaced. In that case the prosecutor's closing argument compared the defendant to a 9/11 "terrorist" on the eve of the first anniversary of those events and referenced irrelevant evidence that the defendant was forcing children to sell drugs. Reversal of the convictions, however, was based on the fact that "[i]nadmissible evidence and highly inflammatory statements came rolling in unimpeded" throughout the trial in such a pervasive manner as to undermine the soundness of the jury verdict. *Id.* at 263–65. This court applies a similar standard to the prejudice inquiry: "[A]bsent 'consistent and repeated misrepresentation' to influence a jury, '[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions' " of severe misconduct; by contrast, "tainted closing arguments that follow on the heels of improper and indecorous prosecutorial conduct during trial are more likely to amount to the type of severe misconduct that justifies reversing a conviction." *North,* 910 F.2d at 897 (second alteration in original) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 646, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). But unlike in the Third Circuit case, that standard is not met in the instant case.

Here, the severity of what appellants have identified on appeal as misconduct was limited to relatively small portions of lengthy opening and closing arguments. *See United States v. Monaghan,* 741 F.2d 1434, 1443 (D.C.Cir.1984). As this court has observed on occasion, "the length of time between the prosecutor's opening statement and jury deliberations"—seven months in the instant case—"makes it unlikely that specific allegations in the opening profoundly influenced those deliberations." *United States v. Williams–Davis,* 90 F.3d 490, 508 (D.C.Cir.1996). Moreover, the district court repeated its general limiting instruction that the statements of counsel are not evidence at the outset of the trial and following the prosecutor's opening argument, May 9, 2002 PM Trial Tr. at 114, and again after closing arguments in giving final instructions to the jury, *see* Dec. 9, 2002 AM Trial Tr. at 72. This is usually a strong ameliorative consideration for prosecutorial misconduct during opening, *see Thomas,* 114 F.3d at 249, and closing argument, *Childress,* 58 F.3d at 716; *North,* 910 F.2d at 897; *United States v. Hawkins,* 595 F.2d 751, 754–55 (D.C.Cir.1978). Although the type of general instruction given here is not a guarantee for the government as necessarily mitigating the prejudicial effects of prosecutorial misconduct in arguments, *see North,* 910 F.2d at 897 n. 33, this is not a "particularly egregious case[ ]" that would require additional cautionary and limiting instructions, and the defense did not request them, *Thomas,* 114 F.3d at 249 (citation and quotation marks omitted). Under the circumstances, we conclude, assuming prosecutorial misconduct during opening and closing arguments to the jury, that the misconduct did not impermissibly and prejudicially interfere with the jury's ability to assess the evidence.

### B.

[18] *Overview Witness.* More problematic is the government's use of a Federal Bureau of Investigation ("FBI") agent as an overview witness. FBI Agent Daniel Sparks testified as the first witness in the government's case-in-chief. His testimony provided an overview of the government's case, setting forth for the jury the script of the testimony and evidence the jury could expect the government to present in its *55 case-in-chief. Further, he expressed his opinion, based on his training and experience, about the nature of the investigation conducted in this case.

Appellants contend that the use of an overview witness as the government's first witness improperly permitted the government, over defense objections, to elicit FBI Agent Sparks's opinions about the charged crimes, the reasons for appellants' actions in various circumstances, the nature of the charged conspiracy and the relationships between co-conspirators, including the cooperating co-conspirators who testified as government witnesses, and the strength of the evidence—all before the government had presented any such evidence. Appellants suggest that FBI Agent Sparks's testimony left the impression for the jury that it should accept that the co-conspirator cooperating witnesses would fully and truthfully recount the events and impressions that he outlined in his testimony. Hence, the question is whether such overview testimony is permissible, and even if permissible with respect to the FBI agent's description of aspects of the pre-indictment investigation of which he had personal knowledge, whether the overview witness's testimony here caused substantial prejudice to appellants. Our conclusions are not affected by whether appellants' challenge is viewed as a question of prosecutorial misconduct, as appellants contend, or a claim of abuse of discretion by the district court in admitting inadmissible evidence, *United States v. Watson,* 409 F.3d 458, 462 (D.C.Cir.2005); *United States v. Microsoft Corp.,* 253 F.3d 34, 101 (D.C.Cir.2001).

Until recently this court had not addressed the appropriateness of a government overview witness at the outset of its case, but had identified the "obvious dangers posed by summarization of evidence" by a non-expert witness called by the government during its case-in-chief in *United States v. Lemire,* 720 F.2d 1327, 1348 (D.C.Cir.1983). The analysis in *Lemire* is instructive. In that case, the government called toward the end of its case-in-chief an FBI agent, who was also a certified public accountant, "to summarize the evidence about the complex cash flow through offshore companies" in a prosecution for wire fraud, interstate transportation of proceeds of fraud, and conspiracy. *Id.* at 1346. The FBI agent "used four summary charts to re-examine th[e] evidence" already presented by the government "in a more organized fashion," and "prefaced each piece of his testimony by identifying the document in evidence from which he obtained the information." *Id.* Upon defense objection that the FBI agent was an improper witness under Federal Rule of Evidence 602,[FN8] the district court conducted a "full voir dire examination" before allowing the FBI agent to testify, "subject to limiting instructions that his testimony was explanatory and was not itself substantive evidence." *Id.* at 1346–47.

> FN8. At the time, Rule 602 of the Federal Rules of Evidence provided, as relevant, that " '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.' " *Lemire,* 720 F.2d at 1347 n. 30 (quoting FED.R.EVID. 602). Subsequent amendments were technical in nature. *See* FED.R.EVID. 602 advisory committee's note.

On appeal, this court held that the district court did not abuse its discretion in permitting the government to use a non-expert summary witness because

> neither Rule 602's literal language nor its overriding purpose was violated. [The FBI agent] did not testify about any of the events underlying the trial: he only summarized evidence about cash flows that several prior witnesses had *56 already offered. As to that

evidence, he testified from his personal knowledge of the transcripts and exhibits.

*Id.* at 1347. The court also noted that other courts had "permitted such summaries under Rule 1006, allowing for admission into evidence of summaries of documents too voluminous to be conveniently examined in court" even if the documents were already in evidence. *Id.*[FN9] That rule aside, the court observed that "[t]here is an established tradition that permits a summary of evidence to be put before the jury with proper limiting instructions." *Id.* (citations and quotation marks omitted). Nonetheless, this court concluded that the claim of unfair prejudice "raises more troubling concerns." *Id.* at 1347–48. Initially the court noted that the non-expert summary evidence was cumulative and subject to challenge under Rule 403 as more unfairly prejudicial than probative. *Id.* at 1348. It also acknowledged that a non-expert summary witness "can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." *Id.* But the court pointed to three "obvious dangers posed by summarization of evidence." *Id.*

> FN9. Rule 1006 of the Federal Rules of Evidence provides:
>
> > The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

First, the jury might treat the summary evidence as additional or corroborative evidence that unfairly strengthens the government's case. The court was satisfied that for a summary witness there were adequate safeguards, including cross-examination and limiting instructions, that could be fashioned by the district court to prevent the jury from treating the summary evidence as substantive proof. The court emphasized that the defendant's challenge to the personal knowledge of the summary witness was not an issue because the witness "had carefully reviewed the charts and ensured that they reflected information contained in documents *already in evidence.* " *Id.* at 1349 (emphasis added); *see also United States v. Kayode,* 254 F.3d 204, 212 (D.C.Cir.2001).

Second, summary witness testimony posed the risk that otherwise inadmissible evidence might be introduced. This concern was ameliorated, the court concluded, because "the judge, prosecutor and defense counsel all heard the evidence upon which [the witness] based his summary" and hence "he was unlikely to stray from that evidentiary base without quickly being stopped." *Lemire,* 720 F.2d at 1349 n. 33. Indeed, the court noted, "at one point the witness inadvertently started to discuss material not in evidence, and the prosecutor prevented him from doing so." *Id.*

Third, a summary witness might permit the government to have an extra closing argument. The court noted, however, that the summary witness had made no "controversial inferences or pronounced judgment" and thus the district court had no need to interfere with the examination on this ground. *See id.* at 1349–50.

Other circuits to address the use of overview witnesses have reached uniformly negative conclusions in view of the serious dangers of prejudice to a fair trial. The Court of Appeals for the First, Second, and Fifth Circuits have held that the use of overview testimony by the government is a "troubling development" for this very *57 reason. *United States v. Casas,* 356 F.3d 104, 120 (1st Cir.2004); *see also United States v. Garcia,* 413 F.3d 201 (2d Cir.2005); *United States v. Griffin,* 324 F.3d 330 (5th Cir.2003). As the First Circuit explained in describing the practice as "inherently problematic":

> [S]uch testimony raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence. There is also the possibility that later testimony might be different than what the overview witness assumed; objections could be sustained or the

> witness could change his or her story. Overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government.

*Casas,* 356 F.3d at 119–20 (internal citation omitted).

Approaching the question from a different perspective, the Second Circuit prohibited overview witnesses from giving lay opinions about anticipated evidence without satisfying the three requirements of Federal Rule of Evidence 701—that the witness's testimony (1) be based on his personal perception, (2) be helpful to the jury, and (3) not be based on scientific, technical, or other specialized knowledge. *See Garcia,* 413 F.3d at 211–17. As regards the second factor, the Second Circuit dismissed the notion that an overview witness aided the jury by framing how the government's case-in-chief will unfold, observing that "[t]he law already provides an adequate vehicle for the government to 'help' the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant's culpability: the opening statement." *Id.* at 214. To the extent the summary witness testified to the ultimate question of fact, the Second Circuit noted that "courts should be wary of opinion testimony whose 'sole function is to answer the same question that the trier of fact is to consider in its deliberations,' " *id.* at 210 (quoting 4 WEINSTEIN'S FEDERAL EVIDENCE § 701.05 (2d ed.2004), and citing FED. R. EVID. 704 advisory committee's notes to 1972 proposed rules), observing that it had previously held in two other cases that it was "error to allow law enforcement witnesses to express opinions as to [the] defendants' culpability based on the totality of information gathered in the course of their investigations," *id.* at 211 (citing *United States v. Grinage,* 390 F.3d 746, 749–51 (2d Cir.2004); *United States v. Dukagjini,* 326 F.3d 45, 54 (2d Cir.2003)). The court held that "the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion ... based [on investigative work] and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience." *Id.* at 216.

This court recently observed that the First, Second, and Fifth Circuits "have viewed agents' hearsay-laden or hearsay-based overview testimony at the onset of trial as a rather blatant prosecutorial attempt to circumvent hearsay rules." *United States v. Smith,* 640 F.3d 358, 367 (D.C.Cir.2011) (citations omitted). In *Smith,* the defendant was charged with drug and firearm offenses. An FBI agent testified at the start of the trial that Smith and a co-conspirator "were working together putting their money together and going to New York to buy heroin." *Id.* at 366. On appeal, Smith contended that the overview testimony—the single sentence—was based on inadmissible hearsay and thus violated Federal Rules of Evidence ("FRE") 701 and 802. Assuming the same prohibition against inadmissible hearsay testimony by an overview witness applied as in the other circuits, the court concluded*58 that the FBI agent's objected-to single-sentence testimony was not based on otherwise inadmissible hearsay because the underlying statements were either admissions of a party-opponent or co-conspirator statements under FRE 801(d)(2), *see id.* at 367–68, and if error, was harmless, *see id.* at 368. The court reached the same ultimate conclusion with respect to the agent's lay opinion testimony about the meaning of slang used by Smith and his co-conspirators during recorded conversations; although the lay opinion testimony was inadmissible under FRE 701 because it was based on specialized knowledge gained from working on other drug investigations, *id.* at 365 (citing *United States v. Wilson,* 605 F.3d 985, 1026 (D.C.Cir.2010)), the error was harmless because the agent would have qualified as an expert under FRE 702 and offered the same testimony, *id.* at 366.

[19] The district court is ordinarily afforded broad discretion to determine the manner in which evidence will be received. *See Huddleston v. United States,* 485 U.S. 681, 690, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). But in *Lemire,* this court concluded that "the pervasiveness of the[ ] dangers [it had identified with summarization of evidence] requires that we review the use of a summary witness closely." 720 F.2d at 1348. Indeed, it was only "under appropriate circumstances with appropriate instructions" that this court "in the past approved the use of summary witnesses ... in jury trials." *Microsoft Corp.,* 253 F.3d at 101. We accordingly review

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FBI Agent Sparks's overview testimony closely, aware that there was no *voir dire* before his testimony and a limiting instruction was given to the jury only after he completed his testimony, and then only with regard to opinions, not otherwise described, that he may have offered while testifying.

All three dangers identified by this court in *Lemire* are evident from the record in this case: FBI Agent Sparks testified about evidence not yet presented while opining that the cooperating witnesses would present truthful evidence because they were insiders and were guilty themselves, strengthening the government's yet-to-be presented case and offering inadmissible evidence while providing the government with a second opening argument. For example, upon being shown a map of the District of Columbia, FBI Agent Sparks confirmed that the 31 circles located on the map accurately reflected the locations of the 31 charged murders, and that murders clustered in certain locations occurred toward the beginning of the charged conspiracy. *See* May 15, 2002 AM Trial Tr. at 68–69. But no such evidence was before the jury and FBI Agent Sparks did not purport to testify from personal knowledge of each murder. At other points, FBI Agent Sparks referred to witness testimony that was never presented to the jury during the course of the trial. In one exemplary circumstance, FBI Agent Sparks testified on redirect examination that co-conspirator Erskine Hartwell had described his role in the conspiracy as supplying drugs and introducing Moore and Gray to Oscar Veal. *See* May 16, 2002 AM Trial Tr. at 56. When asked by the district court whether this information was "based on what [Hartwell] told [him]," FBI Agent Sparks agreed, prompting the district court to state: "The jury is going to hear his testimony." *Id.* at 57. Yet when asked only moments later by the prosecutor "if Erskine Hartwell will be a witness in this case or not," FBI Agent Sparks replied that he "d[idn't] know for sure if [Hartwell] will." *Id.* at 59. From portions of the transcript submitted by the parties to this court, there is no indication that Hartwell testified at trial and hence "later testimony ... differe[d] [from] what *59 the overview witness assumed." *Casas,* 356 F.3d at 119–20. The prosecutor thus impermissibly invited the jury to "rely upon the alleged facts in the [overview] as if [those] facts had already been proved." *Griffin,* 324 F.3d at 349 (alterations in original) (citation and internal quotation marks omitted).[FN10]

Likewise, FBI Agent Sparks impermissibly commented on the strength of the government's yet-to-be introduced evidence, vouched for the credibility of witnesses the government intended to call at trial, and gave his personal opinion as to guilt or innocence. Weighing trial evidence and making "[d]eterminations of credibility are for the jury," *United States v. Boyd,* 54 F.3d 868, 871 (D.C.Cir.1995) (citation and quotation marks omitted); *see also Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), as is "draw[ing] the ultimate conclusion of guilt or innocence," *United States v. Gaudin,* 515 U.S. 506, 514, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *see also Garcia,* 413 F.3d at 210–11; *United States v. Peterson,* 483 F.2d 1222, 1238 (D.C.Cir.1973). FBI Agent Sparks's testimony crossed the line in a number of instances. For example, he testified that it was important, in his view, to use cooperating witnesses in this case because it was "the only way" to gain "access to the inside information." May 15, 2002 AM Trial Tr. at 25. Acknowledging that cooperating witnesses were "themselves ... criminals[,] unfortunately," he further testified that the cooperating co-conspirator witnesses nonetheless

> know what's going on, they have the information, they're the eyewitnesses, ear-witnesses, they hear what these guys are talking about after they commit a murder, they witness a murder, they know where the stash locations are for drugs.... [T]hey are present when drug deals are done. They have been with these people day in and day out, and you need that kind of testimony. That's the only way to put these kind[s] of cases together.

*Id.* He also testified that the goal in a debriefing session was to "[g]et [ ] complete and truthful information" and that it was important to "try and verify" the

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FN10. Other co-conspirator cooperating witnesses testified to Hartwell's role in the conspiracy. *See, e.g.,* May 20, 2002 PM Trial Tr. at 139; Aug. 26, 2002 PM Trial Tr. at 113–16.

information "[j]ust to make sure the person is truthful, that they are complete." *Id.* at 15, 16. On redirect examination, FBI Agent Sparks reinforced the notion that the cooperating witnesses were guilty of committing crimes in their capacity as the defendants' co-conspirators:

> Q: You were asked a lot of questions on cross-examination about cooperating witnesses, and you continually referred to them as criminals.
>
> A: Yes.
>
> Q: Any doubt in your mind about that?
>
> A: None whatsoever.

May 16, 2002 AM Trial Tr. at 59.

All of this was opinion testimony that went far beyond "constructing the sequence of events in the investigation ... to provide background information and to explain how and why the agents even came to be involved with [a] particular defendant." *United States v. Flores–de–Jesús,* 569 F.3d 8, 19 (1st Cir.2009) (citations and internal quotation marks omitted). Instead, these statements suggested both directly and indirectly to the jury that an experienced and highly trained FBI agent had determined that the cooperating co-conspirators who would testify at trial were to be treated as credible witnesses and that appellants were guilty of the charged crimes. The clear implication was that the government had selected only ***60** truthful co-conspirator witnesses for the pre-indictment investigation, from whom the jury would hear during the trial.

In sum, FBI Agent Sparks's testimony was improper in offering his non-expert opinions about the charged conspiracy and appellants, vouching for the reliability of the investigation and of the cooperating co-conspirator witnesses the government planned to have testify at trial, and discussing evidence that had yet to be introduced. Given the dearth of taped conversations and videotaped evidence—none as to Moore—and almost exclusive reliance on co-conspirator cooperators' testimony, the government understandably might seek at the outset to enhance its case in the jury's mind with the imprimatur of an FBI agent. But the prosecutor went too far in questioning, allowing FBI Agent Sparks to act as an expert witness with respect to gang investigations and to refer to evidence that would never be introduced at trial. The district court, in turn, failed to sustain appropriate defense objections to FBI Agent Sparks's testimony that purported to offer opinion testimony and to confirm government evidence that had yet to be introduced.

Because a witness presenting an overview of the government's case-in-chief runs the serious risk of permitting the government to impermissibly "paint a picture of guilt before the evidence has been introduced," *Griffin,* 324 F.3d at 349, and may never be introduced, *see Flores–de–Jesús,* 569 F.3d at 17, we join the circuits that have addressed the issue in condemning the practice. *Casas,* 356 F.3d at 119 (1st Cir.2004); *Garcia,* 413 F.3d at 214 (2d Cir.); *Griffin,* 324 F.3d at 349 (5th Cir.2003). *See generally* 6 WEINSTEIN'S FEDERAL EVIDENCE §§ 1006.04[3], 1006.08[4]. The use of overview witnesses exacerbates the "obvious dangers" this court identified in *Lemire* in the use of non-expert summarization evidence. Overview testimony offers an opportunity to "poison the jury's mind against the defendant or to recite items of highly questionable evidence." *Thomas,* 114 F.3d at 248 (citation and internal quotation marks omitted). Avoidance of those dangers is largely beyond the ability of the district court, much less the defense, to prevent. As the record here demonstrates, a trained law enforcement officer is likely to go as far as the questions allow, presenting a picture for the jury of a solid prosecution case based on his opinion of the strength and credibility of the witnesses the government plans to call to testify at trial for reasons made persuasive in view of the officer's training and experience. *See, e.g.,* May 15, 2002 AM Trial Tr. at 15–16 (prosecutor asking FBI Agent Sparks why truthful information is important). After-the-fact limiting instructions can, at best, mitigate prejudice, rather than invariably eliminate its effects completely. *See United States v. Curley,* 639 F.3d 50, 57 (2d Cir.2011); *Woodcock v. Amaral,* 511 F.2d 985, 994 (1st Cir.1974). The view of the government's case has been implanted in the mind of the jury by an agent of the Federal Bureau of Investigation who worked on the case—he should know!

[20] The government remains free to call as its first witness a law enforcement officer who is familiar with the pre-indictment investigation or was otherwise personally involved, where permissible under the Rules of Evidence and consistent with constitutional guarantees. *See Old Chief v. United States,* 519 U.S. 172, 186–88, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); *United States v. Curtis,* 481 F.3d 836, 838 (D.C.Cir.2007). Such a witness may, for example, be able to provide relevant background information as to the investigation's duration and scope or the methods of surveillance, based on personal knowledge. ***61** *See Flores–de–Jesús,* 569 F.3d at 19. Put another way, a law enforcement officer may "describe a complicated government program in terms that do not address witness credibility," but he may not offer "tendentious testimony." *Griffin,* 324 F.3d at 349. Thus, FBI Agent Sparks could properly describe, based on his personal knowledge, how the gang investigation in this case was initiated, what law enforcement entities were involved, and what investigative techniques were used. *See, e.g.,* May 13, 2002 PM Trial Tr. at 50–51. What he could not do was present lay opinion testimony about investigative techniques in general and opine on what generally works and what does not, as illustrated by informants who pled guilty. Neither could he anticipate evidence that the government would hope to introduce at trial about the charged offenses or express an opinion, directly or indirectly, about the strength of that evidence or the credibility of any of the government's potential witnesses, including the cooperating co-conspirators.

[21] Although the question is close, we conclude for the following reasons that the prejudice resulting from the admission of FBI Agent Sparks's overview testimony, to the extent it was inappropriate, was ameliorated: (1) Each instance of FBI Agent Sparks's improper testimony identified by appellants was later confirmed by admissible evidence at trial, *see* Appellee's Br. at 105–07; *supra* note 10; *see also Griffin,* 324 F.3d at 350. (2) Appellants' defense was limited to cross-examining testifying cooperating co-conspirators and other government witnesses (such as Margarita Simmons, an eyewitness to the murder of her son, Richard Simmons, *see infra* Part XXIII.B), *see United States v. Garcia–Morales,* 382 F.3d 12, 18 (1st Cir.2004). (3) The district court instructed at the conclusion of FBI Agent Sparks's testimony in the government's case-in-chief that the jury was to disregard any opinion testimony he offered, *see* May 16, 2002 AM Trial Tr. at 90. (4) There was overwhelming evidence of appellants' guilt, *see, e.g., infra* Parts VII, XVIII, XXIII.B. And as to some of his impermissible opinion testimony, FBI Agent Sparks might have qualified as an expert, *see Smith,* 640 F.3d at 366. Accordingly, the error did not "affect[ ] the outcome of the district court proceeding [ ]," *United States v. Sumlin,* 271 F.3d 274, 281 (D.C.Cir.2001) (citation and quotation marks omitted), and hence appellants are not entitled to reversal of their convictions because of improper overview testimony by FBI Agent Sparks.

The inauspicious beginning of the government's case-in-chief is easily avoided in the future. No less than the court, the Department of Justice recognizes the high standard set for the prosecution by the Supreme Court in *Berger,* 295 U.S. at 88, 55 S.Ct. 629. Similarly, this court's long-held view of the purpose of the opening statement to the jury, namely to allow the prosecutor the opportunity to provide the jury with an objective overview of the evidence that the government intends to introduce at trial, *see Thomas,* 114 F.3d at 247–48, has long afforded the prosecutor the opportunity to do that for which the prosecutor improperly used FBI Agent Sparks, *see Garcia,* 413 F.3d at 214. This court now having made clear the exacerbated "obvious dangers" of the overview witness testifying about evidence yet to be admitted before the jury affords all parties clear direction to avoid unnecessary risks—for the prosecutor of an overturned conviction, for the defense of an unfair trial, and for the district court of having to retry a case.

### C.

Much for the reasons stated in the government's brief, appellants' litany of prosecutorial***62** misconduct claims do not, in their cumulative effect, warrant reversal. In this regard, we have considered the probable aggregate effect of any impermissible prosecutorial conduct that may have occurred on the jury's ability to judge the evidence fairly. *See United States v. Celis,* 608 F.3d 818, 847 (D.C.Cir.2010) (citing *Egan v. United States,* 287 F. 958, 971 (D.C.Cir.1923)); *see also Thomas,* 114 F.3d at 246. In addressing only two of appellants' claims of prosecutorial misconduct, we implicitly have indicated that any other prosecutorial misconduct that may have occurred was minor in itself and had no prejudicial effect in view of limiting instructions. For example, appellants maintain that the prosecutor impermissibly vouched for the credibility of the government's witnesses, particularly co-conspirator cooperating witnesses, during closing rebuttal argument. Although statements such as "[t]hey're telling the truth about their experiences," Dec. 4, 2002 AM Trial Tr. at 86, impermissibly express the personal opinion of the prosecutor, they were responses, based on evidence introduced at trial, to appellants' attacks on the credibility of the government's witnesses during closing argument. *See United States v. Young,* 470 U.S. 1, 17–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Brown,* 508 F.3d 1066, 1075–76 (D.C.Cir.2007); *United States v. Robinson,* 59 F.3d 1318, 1323 (D.C.Cir.1995). The prosecutor emphasized to the jurors, however, that it was their province to weigh the credibility of witnesses regardless of the arguments of counsel. *See* Dec. 4, 2002 AM Trial Tr. at 69; *cf. United States v. Nnanyererugo,* 39 F.3d 1205, 1209 (D.C.Cir.1994). Importantly, the district court instructed the jury that it alone determined "the weight, the effect and the value of the evidence and the credibility of the witnesses," which evidence did not include counsels' opening and closing arguments. *See* Dec. 9, 2002 AM Trial Tr. at 70, 72; *see also Childress,* 58 F.3d at 716; *North,* 910 F.2d at 897; *United States v. Hawkins,* 595 F.2d 751, 754–55 (D.C.Cir.1978).

Other claims of prosecutorial misconduct, including appellants' arguments relating to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the federal bribery statute, 18 U.S.C. § 201(c)(2), *see infra* Parts VI and XII, are without merit. Similarly, appellants' claim that the prosecutor, by eliciting testimony that appellants had sought the advice of a certain named attorney to defend against criminal charges not at issue in this case, inappropriately implied that appellants were guilty because they took steps to retain this counsel, thus penalizing appellants for exercising their constitutional right to counsel under the Sixth Amendment, is without merit. *See United States ex rel. Macon v. Yeager,* 476 F.2d 613 (3d Cir.1973). Although some testimony might impermissibly have revealed privileged attorney-client conversations, an argument appellants do not make, there was not a direct statement by the prosecutor, as in *Yeager,* that appellants retained counsel in the instant case because they were guilty. *Cf. United States v. Liddy,* 509 F.2d 428, 442–45 (D.C.Cir.1974) (en banc). Rather, the evidence demonstrated that the attorney linked several members of the conspiracy, including Moore and Gray.

Having considered all of appellants' claims of prosecutorial misconduct, we conclude, in light of the district court's limiting instructions regarding statements of counsel and regarding particular arguments or evidence, and the overwhelming evidence of appellants' guilt insofar as any prosecutorial misconduct is concerned, that the cumulative effect of any prosecutorial misconduct of which appellants complain did not affect the outcome of the trial, and ***63** therefore, was harmless. *See Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *see also Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

## V.

At trial, the government introduced evidence about Moore's role in an uncharged drug-trafficking conspiracy run by Rayful Edmond; Nunn's role in an uncharged conspiracy with Phyllis Webster; the apprehension of Rodman Lee, who was not a charged co-conspirator, while he was with Gray, and the contemporaneous discovery in Lee's car of cocaine and cocaine base, none of which the government claims pertained to the charged conspiracy; several uncharged murders and shootings; and Gray's uncharged conduct as a juvenile and others' perceptions of Gray as a leader while he was detained at the Oak Hill Juvenile Facility. Appellants argue that this evidence was irrelevant and highly prejudicial, admitted in violation of Rules 404(b) and 403 of the Federal Rules of Evidence. The cumulative effect of these evidentiary errors, appellants claim, deprived them of due process of law.

[22] Rule 404(b) declares inadmissible evidence of "other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." FED.R.EVID. 404(b). But not all evidence of uncharged crimes, wrongs, or acts is barred by this rule. When evidence of such acts is "intrinsic" to the charged crime, it is not evidence of "other" acts and is thus wholly unregulated by Rule 404(b). *See United States v. Alexander,* 331 F.3d 116, 124–27 (D.C.Cir.2003); *United States v. Bowie,* 232 F.3d 923, 927–28 (D.C.Cir.2000); *United States v. Badru,* 97 F.3d 1471, 1473–75 (D.C.Cir.1996). "Intrinsic" evidence encompasses evidence that is either "of an act that is part of the charged offense" or is of "acts performed contemporaneously with the charged crime ... if they facilitate the commission of the charged crime." *Bowie,* 232 F.3d at 929.

Rule 403 provides that even evidence otherwise admissible "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED.R.EVID. 403. Rule 403 requires the district court to engage in "on-the-spot balancing of probative value and prejudice" and to exclude even factually relevant evidence when it fails the balancing test. *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 384, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008) (quoting 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.02, at 4–16 (3d ed.1999)) (internal quotation marks omitted).

[23] Appellants claim that the district court should have barred the government from introducing the evidence of uncharged conduct in question because it was not "intrinsic" to the charged conduct and was therefore evidence of "other crimes, wrongs, or acts" barred by Rule 404(b). Appellants also contend that such evidence was erroneously admitted under Rule 403 because its risk of prejudice to the defendants substantially outweighed its probative value. Although appellants are likely correct that the district erred by permitting the government to introduce the evidence of uncharged conduct at issue, particularly of Moore's role in the Rayful Edmond conspiracy, Nunn's role in the Phyllis Webster conspiracy, and Gray's unlawful conduct as a juvenile,[FN11] we ***64** hold that any error was not reversible. Even assuming constitutional error, we will not reverse a conviction if the error was "harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In light of the amount and strength of the evidence the government presented of the charged crimes, we find that any potential error was harmless.

FN11. Circuit Judge Rogers would find error under Rule 404(b) as to the introduction of certain evidence, but nonetheless conclude the errors were harmless beyond a reasonable doubt for the reasons stated by the court. Exemplary is the testimony of Rayful Edmond, a notorious drug kingpin in the District of Columbia serving multiple life sentences in prison following his conviction. *See United States v. Edmond,* 52 F.3d 1080, 1083–84, 1087 (D.C.Cir.1995). Edmond testified for two days at trial concerning a separate, violent conspiracy that predated the Moore and Gray conspiracy charged in the superseding indictment. The fact that Moore was involved in Edmond's conspiracy was irrelevant to the charged conspiracy, as the trial transcript belies the government's assertion that the Edmond conspiracy was the genesis of, and template for, Moore's drug-trafficking operation. Accordingly, Edmond's testimony about Moore's prior criminal activity can only be viewed as propensity evidence introduced to demonstrate Moore's bad character, *see United States v. Douglas,* 482 F.3d 591, 596 (D.C.Cir.2007), and to "complete [Moore's] story" or "explain [his] circumstances," a practice this court rejected in *United States v. Bowie,* 232 F.3d 923, 929 (D.C.Cir.2000). The same is true of evidence regarding Gray's unlawful conduct as a juvenile, which evidence the government purported was designed to demonstrate the formation and

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> scope of the charged conspiracy. The evidence went beyond the fact that Gray met members of the charged conspiracy while incarcerated in a facility for juvenile delinquents and served no purpose other than to show his bad character. *See Douglas,* 482 F.3d at 596.

## VI.

In 1996, Gray murdered Ricardo Bailey. Gray did so at the request of Rodman Lee. Gray and Lee were arrested while fleeing the scene of the murder, and a search of Lee's van revealed approximately five kilograms of cocaine hidden in a secret compartment. Lee pled guilty to the ensuing drug charges. Documents related to that plea show that Lee was a major drug dealer, that Lee was senior to Gray in status as a drug dealer, and that Lee was transporting most of the cocaine in his van to a distributor who was not implicated in the Moore and Gray conspiracy.

Appellants claim that the government's failure to disclose the information in Lee's plea documents to the defense violated the government's obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Appellants' *Brady* claim fails because some of this information was not favorable to appellants, and because the government's failure to disclose the remainder did not cause prejudice.

The evidence showing that Lee was a higher-level drug dealer than Gray would not have aided appellants. The government itself contended that Lee was "at a higher level in terms of drugs than Kevin Gray." May 9, 2002 PM Trial Tr. at 69. According to the government, it was Lee's status as a major cocaine supplier that motivated Gray to murder Bailey on Lee's behalf.

[24] With respect to the evidence that the drugs in Lee's van were destined for ***65** someone outside the Moore and Gray conspiracy, appellants' *Brady* claim fails because they cannot show prejudice. To show prejudice, appellants must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Pettiford,* 627 F.3d 1223, 1227 (D.C.Cir.2010) (quoting *Strickler,* 527 U.S. at 280, 119 S.Ct. 1936). "The defendant bears the burden of showing a reasonable probability of a different outcome." *United States v. Johnson,* 519 F.3d 478, 488 (D.C.Cir.2008) (citing *Strickler,* 527 U.S. at 291, 119 S.Ct. 1936).

[25] The evidence that the drugs in Lee's van were not destined for the Moore and Gray organization would have been of minimal value to the defense. In its opening statement, the government mentioned the drugs' destination only in passing, during a lengthy description of Gray murdering Bailey. *See* May 9, 2002 PM Trial Tr. at 71. The government made no other claims about those particular drugs' intended recipient, and the drugs' destination was not material to the government's case. Rather, the drugs were significant simply because their presence corroborated the government's claim that Lee was a major drug dealer for whom Gray would be willing to kill others.

Moreover, the evidence that Lee had distributors outside the Moore and Gray organization would not have materially aided appellants. The defense had already shown that members of the Moore and Gray conspiracy were *also* involved in other drug rings. Corroboration of that fact would have had little importance, because the government did not deny that Lee, Gray, or others had illegal business not directly related to Moore and Gray's conspiracy. Criminals may of course participate in more than one conspiracy. *See, e.g., United States v. Marino,* 277 F.3d 11, 25 (1st Cir.2002); *see also United States v. Childress,* 58 F.3d 693, 711 n. 3 (D.C.Cir.1995) ("[T]he fact that certain conspirators engage in independent drug transactions does not on its own negate the existence of a single conspiracy."). The fact that some appellants did so does not contradict the overwhelming evidence that Moore and Gray continued to collaborate on crimes long after the defense claimed they had parted ways. *See Pettiford,* 627 F.3d at 1227 ("The court ... has a responsibility to evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record." (citation and quotation marks omitted)).

The government did not violate *Brady* with respect to the Lee evidence.

## VII.

[26] In a superseding indictment filed on November 17, 2000, appellants and other indicted and unindicted co-conspirators were charged with participating in a drug and RICO conspiracy jointly led by Moore and Gray for over 12 years, from approximately 1988 through March 2000. Under the five-year statute of limitations applicable to these charges, *see* 18 U.S.C. § 3282, the government had to prove that Moore and Gray's joint leadership continued into the limitations period, beginning November 17, 1995.[FN12] *See United States v. Seher,* 562 F.3d 1344, 1364 (11th Cir.2009). Applying well-settled law that the court must accept the jury's guilty verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," we affirm the judgment ***66** of conviction on these charges. *United States v. Dykes,* 406 F.3d 717, 721 (D.C.Cir.2005) (citation and quotation marks omitted).

> FN12. This is the latest relevant date by which the government had to prove the jointly-led conspiracy and continuing criminal enterprise existed as to any appellant. For ease of analysis we address the sufficiency of evidence as to this date for all appellants.

Appellants contend that there was insufficient evidence for the jury to find beyond a reasonable doubt that Moore and Gray jointly led a unified conspiracy through November 17, 1995. They maintain that the evidence showed there were multiple conspiracies—essentially that Moore and Gray split up their drug operations in the 1993–1994 time frame and thereafter operated separate conspiracies in different sectors of the city that came into contact with each other only casually. *See generally United States v. Tarantino,* 846 F.2d 1384, 1391–93 (D.C.Cir.1988). Rather than maintain that the government failed to prove the traditional elements for a single conspiracy—common goal, interdependence, and, to a lesser extent, overlap of participants, *see id.* at 1393—appellants identify the "crux of this issue" to be whether the government presented sufficient evidence that "Moore and Gray *jointly led* the charged conspiracies and [the continuing criminal enterprise] within the statute of limitations periods," Reply Br. at 88, as charged.

[27] As support for their position, appellants point to the evidence describing Moore's relocation from the Southeast to Northeast quadrant of Washington, D.C., prior to November 17, 1995, leaving Gray to operate separately in Southeast. An examination of this evidence shows that it falls short of undermining the jury's verdict that Moore and Gray's joint leadership of a single conspiracy continued after Moore's move. For instance, appellants emphasize Raymond Sanders's testimony that Moore "dropped out of Southeast" in 1993 or 1994 and was not seen in Southeast thereafter. *See* May 20, 2002 PM Trial Tr. at 126–27. The jury, however, could reasonably have credited other testimony that Moore continued to have dealings in Southeast. *See United States v. Eppolito,* 543 F.3d 25, 54 (2d Cir.2008) ; *see also Dykes,* 406 F.3d at 721. Moreover, "shifting emphases in the location of operations do[es] not necessarily require a finding of more than one conspiracy." *United States v. Jones,* 482 F.3d 60, 72 (2d Cir.2006). As in *United States v. Carson,* we reject the argument that multiple conspiracies can be shown through "attempts artificially to split one conspiracy into two based simply on geographic lines." 455 F.3d 336, 376 (D.C.Cir.2006) (citation and internal quotation marks omitted).

[28] The central issue is whether Moore's and Gray's actions following Moore's relocation to Northeast are inconsistent with the jury's finding that they continued to jointly lead the charged conspiracy past November 17, 1995. On this point, appellants maintain that Moore's relationship with Gray changed, as shown

by evidence that, according to Sanders, after the move Moore supplied Gray with cocaine *only* "a few times." May 20, 2002 PM Trial Tr. at 138. This mischaracterizes Sanders's testimony. On the previous page of the transcript of his testimony Sanders admits that he had no knowledge of who was regularly supplying cocaine to Gray, and that Gray *told him* of "a few times" that Moore had supplied cocaine. *Id.* at 137–38. This is not the same as evidence that Moore supplied Gray's operations in Southeast only a few times. Further, Maurice Andrews testified that Moore was Gray's primary supplier of large quantities of cocaine starting in 1995 and continuing at least into 1996. *See* July 9, 2002 PM Trial Tr. at 54–56; *see also Dykes,* 406 F.3d at 721. There was also evidence that Gray may have initially obtained cocaine from Ronald Alfred, and Frank Howard confirmed a separate conspiracy*67 between himself, Alfred, and Rodman Lee, *see* July 17, 2002 PM Trial Tr. at 135. Such evidence is neither factually nor legally inconsistent with a finding that Moore and Gray continued to lead the charged conspiracy together. Here, much as in *United States v. Maynard,* 615 F.3d 544, 554 (D.C.Cir.2010), as regards "[t]he two purportedly separate conspiracies ..., each comprises the core conspiracy charged." And "the fact that certain conspirators engage in independent drug transactions does not on its own negate the existence of a single conspiracy." *United States v. Childress,* 58 F.3d 693, 711 n. 3 (D.C.Cir.1995).

The government offered ample evidence of a jointly led conspiracy through November 17, 1995. This evidence extends to both the conspiracy's geographic scope and its twin principal aims: to unlawfully distribute drugs and commit murders. *See* Superseding Indict. at 4–5. The key testimony as regards the drug operation in Northeast came from Andrews, who accompanied Gray on a daily basis in 1996. July 9, 2002 PM Trial Tr. at 88. Andrews testified that Gray "had a lot of guys over [in Northeast]," including Moore's cousins, uncles, and brother. *Id.* at 82–84. Each of these family members participated in Gray's Northeast drug business, which involved Moore as well. *See id.* at 85, 86. Indeed, Andrews testified that Moore was the person "in particular responsible for overseeing the drug operation in that area of 7th and H, Northeast." *Id.* at 88. Moore and Gray's joint stewardship in Northeast after November 17, 1995, is established most clearly by Andrews's answers on the government's direct examination:

> Q: How often, when you were hanging out with Kevin Gray every day, Mr. Andrews, how often would you go over to Northeast, Washington?
>
> A: Every day.
>
> Q: And why would you go over to Northeast every day?
>
> A: [Gray] had money over there to pick up and basically we'll go to see [Moore] and then meet [Moore] and them.
>
> Q: And did that occur right on up through at least 1995 and 1996 and into 1997?
>
> A: Correct.
>
> *Id.* at 88–89.

There was also sufficient evidence that Moore and Gray's joint leadership of the conspiracy continued after November 17, 1995, at a Southeast apartment complex located on Halley Terrace. Gray oversaw the drug operation in which Andrews, David Arnold, and Jermaine Vick participated. Although Arnold testified that "Moore never had any dealings with us down on Halley Terrace," Aug. 22, 2002 PM Trial Tr. at 16, Vick and Andrews testified that Moore supplied the Southeast operation with drugs. *See* Sept. 10, 2002 AM Trial Tr. at 11 (Vick); Oct. 16, 2002 AM Trial Tr. at 56 (Andrews); *see also Dykes,* 406 F.3d at 721. Moreover, Andrews's testimony makes clear that this relationship at Halley Terrace continued for six to eight months until a temporary two-month fallout between Moore and Gray around the time of the February 1998 NBA All–Star Game in New York. *See* Oct. 16, 2002 AM Trial Tr. at 56–60. Contrary to appellants' contention that Moore's actions hardly reflected that of a "leader," Appellants' Br. at 161, Vick recalled that Moore came to see Gray "[w]hen he need[ed] to see [Gray] or, you know, he need[ed] to deliver some important information or something like that, or *he needed somebody to carry out a task.*" Sept. 10, 2002 AM Trial Tr. at 12 (emphasis added). Likewise, Oscar Veal testified that he met Moore at Halley Terrace to ***68** discuss murders of targets in Northeast through 1997. *See* Aug. 27, 2002 AM Trial Tr. at 13. From this evidence, the jury could reasonably infer that Moore's absence from time to time did not necessarily point toward a non-leadership role; instead it might suggest that Moore was a principal acting in a supervisory role, while Gray coordinated the day-to-day operations.

Finally, the jury could have reasonably relied on evidence concerning Veal's 1998 murder of Roy Cobb, a rival drug dealer, well into the statutory limitations period. As Veal recounts, Gray drove both of them from Southeast to meet Moore at a location in Northeast. Once there, and in the presence of other members of the conspiracy, Moore and Gray discussed killing Cobb. Having already devised a plan for the murder, Moore and Gray walked Veal to a specific location where it was known that Cobb would stop at an intersection, and instructed Veal on how to go about killing Cobb. Although Moore and Gray continued to refine and change the plan, Gray provided Veal with the gun used to murder Cobb and afterward Moore compensated Veal with cash and cocaine. *See id.* at 50–55, 90; *see also* Oct. 16, 2002 AM Trial Tr. at 108–11, 116–20.

In sum, the evidence on which appellants rely in attempting to demonstrate that Moore and Gray ceased to serve as joint leaders of the charged conspiracy in 1993 or 1994 does not support the weight they place upon it, could reasonably have been rejected by the jury in light of other witnesses' contrary testimony, or is irrelevant to the existence of joint leadership. Mindful that " 'the prosecution's evidence is to be viewed in the light most favorable to the government, drawing no distinction between direct and circumstantial evidence, and giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact,' " *Dykes,* 406 F.3d at 721 (quoting *United States v. Foster,* 783 F.2d 1087, 1088 (D.C.Cir.1986)), we hold that sufficient evidence supported the jury's finding that Moore and Gray jointly led the charged conspiracy within the limitations period.

## VIII.

Appellants argue that all charges under the District of Columbia Code were improperly joined to their federal indictment under Rule 8(b) of the Federal Rules of Criminal Procedure. Because joinder was improper, appellants maintain, the district court lacked jurisdiction to hear those charges under § 11–502(3) of the District of Columbia Code, which provides that "the United States District Court for the District of Columbia has jurisdiction of ... [a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense."

We have interpreted the term "joined" in § 11–502(3) to mean "properly joined under [Federal Rule of Criminal Procedure] 8." *United States v. Jackson,* 562 F.2d 789, 793 (D.C.Cir.1977). Under Rule 8(b) , joinder of the local charges was proper here only if all the offenses charged were part of the same "series of acts or transactions." *See id.* at 794 (holding that "the propriety of joinder in cases where there are multiple defendants must be tested by Rule 8(b) alone and that Rule 8(a) has no application"); FED.R.CRIM.P. 8(b) ("The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses."). Appellants' contention is that the superseding indictment and the evidence adduced at trial demonstrate ***69** that the local charges were not properly joined under Rule 8(b), and that the district court therefore lacked jurisdiction. We disagree.

[29] We have held that "a 'series of acts or transactions' is 'two or more acts or transactions connected together or constituting parts of a common scheme or plan.' " *United States v. Brown,* 823 F.2d 591, 598, (D.C.Cir.1987) (quoting *United States v. Perry,* 731 F.2d 985, 990 (D.C.Cir.1984)). Construing the facts of the superseding indictment as true, as we must, *United States v. Zicree,* 605 F.2d 1381, 1387 (5th Cir.1979); *see United States v. Carson,* 455 F.3d 336, 372–73 (D.C.Cir.2006); *United States v. Spriggs,* 102 F.3d

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1245, 1255–56 (D.C.Cir.1996), the local offenses charged were committed as acts in furtherance of the charged conspiracy and/or as predicate acts in the charged RICO conspiracy. All of the charged offenses, local and federal, were thus part of a common scheme or plan, which means that, for purposes of Rule 8(b), they were part of the same series of acts or transactions. *See Carson,* 455 F.3d at 373–74. Because we conclude that the superseding indictment establishes that joinder of the local offenses was proper, we hold the district court had jurisdiction under § 11–502(3).

Even if the evidence adduced at trial had demonstrated that all of the offenses were not part of the same series of acts or transactions—a proposition we reject—this would not strip jurisdiction from the district court. If the indictment establishes proper joinder under Rule 8(b), trial evidence cannot render joinder impermissible and is thus irrelevant to our inquiry. *Spriggs,* 102 F.3d at 1255 ("Rule 8(b) can be satisfied ... by the indictment alone...."); *Perry,* 731 F.2d at 990 (explaining that "[q]uite obviously, the indictment might satisfy th[e] requirement" for Rule 8(b) joinder).

## IX.

[30] Appellants contend that the introduction into evidence of autopsy reports authored by the Office of the Chief Medical Examiner of the District of Columbia and reports of drug analyses performed by the U.S. Drug Enforcement Administration ("DEA") violates the Confrontation Clause of the Sixth Amendment to the Constitution because the reports' authors were not available for cross-examination. Our review of the district court's legal conclusions regarding the Confrontation Clause is *de novo, United States v. Carson,* 455 F.3d 336, 362 (D.C.Cir.2006), and subject to constitutional harmless error analysis pursuant to *Chapman v. California,* 386 U.S. 18, 23–24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), *see United States v. Smith,* 640 F.3d 358, 364 (D.C.Cir.2011); *United States v. Wilson,* 605 F.3d 985, 1014 (D.C.Cir.2010).

The landscape of the Supreme Court's jurisprudence on the Confrontation Clause has changed since appellants' trial concluded in 2003. The governing rule at the time, set forth in *Ohio v. Roberts,* 448 U.S. 56, 65–66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), was that out-of-court statements admitted against a criminal defendant avoided the requirements of the Confrontation Clause if they came within traditional hearsay exceptions or were otherwise reliable. In 2004, however, the Supreme Court relied on the Confrontation Clause's historical underpinnings to hold that "testimonial" out-of-court statements of a declarant not testifying at trial were inadmissible under the Confrontation Clause unless the declarant was unavailable and previously subject to cross-examination. ***70***Crawford v. Washington,* 541 U.S. 36, 53–54, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Statements qualifying as "testimonial" included " *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," other "formalized" materials such as "affidavits, depositions, prior testimony, or confessions," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51–52 (citations and quotation marks omitted). The Court applied *Crawford* in *Melendez–Diaz v. Massachusetts,* — U.S. —, 129 S.Ct. 2527, 2531–32, 174 L.Ed.2d 314 (2009), to hold that the state's use of a forensic laboratory report to prove that seized cocaine was of a certain quality and quantity violated the Confrontation Clause because no live witness competent to testify to the truth of the statements made in the report was available for cross-examination.

The Supreme Court's most recent decision on the Confrontation Clause is *Bullcoming v. New Mexico,* — U.S. —, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). After failing field sobriety tests and refusing a breath test, Bullcoming was arrested and required to give a blood sample for the purpose of determining his blood-alcohol concentration ("BAC"). Bullcoming's blood sample was sent to the New Mexico Department of Health, Scientific Laboratory Division, where a forensic analyst signed a "certificate of analyst," part of a standard form titled "Report of Blood Alcohol Analysis," recording Bullcoming's BAC as 0.21 grams per hundred

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milliliters. New Mexico charged Bullcoming with aggravated driving under the influence of intoxicating liquor, which requires proof of a BAC of 0.16 grams per hundred milliliters. At trial the prosecutor introduced the report and certificate of analyst into evidence as a business record. The forensic analyst who authored the report did not testify at trial and was not otherwise subject to cross-examination by Bullcoming. Instead, the prosecutor called as a witness a scientist from the same laboratory who had not signed the Report of Blood Alcohol Analysis, and neither participated in nor observed the test on Bullcoming's blood sample. The testifying scientist was, however, familiar with blood-alcohol analysis and the laboratory's testing protocols. *Bullcoming,* 131 S.Ct. at 2706–12. Defense counsel objected on Confrontation Clause grounds, and noted that "her opening, indeed, her entire defense 'may very well have been dramatically different' " had the prosecution disclosed prior to the day of the trial that it would not be calling the certifying analyst as a witness. *Id.* at 2712 (citation omitted).

The Supreme Court held that the Report of Blood Alcohol Analysis was "testimonial" and therefore within the ambit of the Confrontation Clause, a resulted dictated by *Melendez–Diaz. Id.* at 2716–17. It further clarified that the "surrogate testimony" of the substitute witness "does not meet the constitutional requirement [of cross-examination]. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular [analyst]." *Id.* at 2710. Three aspects of the Court's reasoning are noteworthy here: First, the Court framed the question presented as whether "the Confrontation Clause permit[s] the prosecution to introduce a forensic laboratory report containing a testimonial certification ... through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the *71 performance of the test reported in the certification." *Id.* at 2713; *see also id.* at 2711–12 (Sotomayor, J., concurring in part). Second, the Court rejected the argument that Bullcoming's "true accuser" was the gas chromatagraph machine that generated the BAC figure and that the analyst's role was that of a "mere scrivener." *Id.* at 2714 (majority opinion). Third, the Court explained that a surrogate witness knowledgeable as to the equipment and protocol used in administering the test was ill-equipped to "convey what [the certifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715.

[31] The facts of the instant case resemble in part those of *Bullcoming.* The government called as witnesses Dr. Jonathan Arden, then-Chief D.C. Medical Examiner, and Jerry Walker, a DEA senior forensic chemist. Dr. Arden testified as to the contents of approximately 30 autopsy reports authored by other medical examiners in his office, but, as in *Bullcoming,* insofar as the record provided by the parties shows, he neither performed nor observed the autopsies and his signature does not appear on any of the reports.[FN13] Similarly, Walker's testimony concerned 24 drug analyses, 20 of which were performed by other DEA forensic chemists on drugs seized in the course of the investigation of the charged conspiracy, the results of which were memorialized in DEA reports. The autopsy and DEA reports were admitted into evidence over appellants' objection that "there is no way to ... confront under the Sixth Amendment" unless the government calls the reports' authors as witnesses. Oct. 23, 2002 PM Trial Tr. at 90.

FN13. The autopsy report of Jaime Pereira, performed by a medical examiner for the Commonwealth of Virginia, was admitted into evidence pursuant to stipulation, and thus raises no Confrontation Clause issue. *See Bullcoming,* 131 S.Ct. at 2706–07.

This case differs from *Bullcoming* in three relevant respects. First, because Walker testified that he authored four DEA reports, *see* Oct. 23, 2002 PM Trial Tr. at 68, and he was available for cross-examination at trial, these four DEA reports present no Confrontation Clause problem under *Bullcoming.*[FN14] The other 20 DEA reports, however, remain at issue.

FN14. Of the four Walker-authored DEA reports, only the DEA report dated May 15, 2000, relating to the March 20, 2000 seizure of drugs from Nunn, appears to have been made a part of the multi-volume record on appeal provided by the parties.

Second, Walker personally reviewed, but did not author, one DEA report shortly after its creation, testifying that "[he] look[ed] at what the results [were] ... and ma[d]e sure that [the analyst] used proper scientific-based knowledge to come up with [the] results." *Id.* at 80. Although the analysis in *Bullcoming* indicates that the degree of participation by the surrogate witness can alter the Confrontation Clause analysis, *see Bullcoming,* 131 S.Ct. at 2715–16; *id.* at 2711–12 (Sotomayor, J., concurring in part), Walker's role appears to be much like that of the surrogate witness in *Bullcoming* because he was unable to "convey what [the authoring forensic chemist] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed," or "expose any lapses or lies on the [authoring forensic chemist's] part," *id.* at 2715 (majority opinion). Walker did not observe the test being performed and did not sign the DEA report as the approving official. Rather, Walker testified that, in *72 performing his review, he was "making an assumption that the chemist used the sample and did the analysis.... I'm making the assumption that they did do each of the tests that they wrote down on their worksheet." Oct. 23, 2002 PM Trial Tr. at 81. In holding there was constitutional error in *Bullcoming,* the Supreme Court relied on a similar statement by the testifying surrogate witness: "you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance." *Bullcoming,* 131 S.Ct. at 2715 n. 8 (alteration in original) (citation and quotation marks omitted).

Third, Dr. Arden testified as the Chief D.C. Medical Examiner, and prior to trial he may well have had either a "supervisor[y]" role with regard to the reports from his Office or even "a personal, albeit limited, connection to the [autopsies] at issue." *Id.* at 2722 (Sotomayor, J., concurring in part). Whether such reports would be inadmissible under the Confrontation Clause despite his testimony is a question left open in *Bullcoming,* where the Court was confronted only with a testifying lab technician who had "no involvement whatsoever in the relevant test and report." *Id.* at 2722.

[32] The government's attempts to avoid the Confrontation Clause, on the grounds that the autopsy reports rank as non-testimonial and that the DEA reports contain "raw data," rather than "statements," Appellee's Br. at 185–87, 189, are foreclosed by *Bullcoming.*[FN15]

FN15. The government suggests that Dr. Arden's and Walker's testimony was permissible as expert testimony pursuant to Federal Rule of Evidence 703. Appellee's Br. at 187, 189. The authority on which the government relies is distinguishable because the forensic reports in those cases were not introduced into evidence at trial. *See, e.g., United States v. Pablo,* 625 F.3d 1285, 1294 (10th Cir.2010); *United States v. Turner,* 591 F.3d 928, 932–33 (7th Cir.2010) . It could well be a different case where an expert witness discussed out-of-court testimonial statements that "were not themselves admitted as evidence." *Bullcoming,* 131 S.Ct. at 2722 (Sotomayor, J., concurring in part); *see also People v. Williams,* 238 Ill.2d 125, 345 Ill.Dec. 425, 939 N.E.2d 268 (2010), *cert. granted,* — U.S. ——, 131 S.Ct. 3090, 180 L.Ed.2d 911, 2011 WL 2535081 (U.S. June 28, 2011). Any expert testimony by Dr. Arden and Walker does not avoid the fact that the autopsy and DEA reports were admitted into evidence at appellants' trial. Moreover, we note but need not decide whether Dr. Arden's or Walker's testimony qualifies as proper expert opinion based on testimonial statements inadmissible under the Confrontation Clause absent live in-court testimony by the declarant. Other courts have held that an expert runs afoul the Confrontation Clause when he "parrot[s] out-of-court testimonial statements ... directly to the jury in the guise of expert opinion." *United States v. Johnson,* 587 F.3d 625, 635 (4th Cir.2009) (citation and internal quotation marks omitted); *see, e.g., Pablo,* 625 F.3d at 1291–95. Here, the testimony by Dr. Arden and Walker often relayed the contents of reports. For example, responding to the prosecutor's question about what "the report indicate[s]" regarding soot or gunpowder marks on the arm of Anthony Dent, Dr. Arden testified that "[the report] specifically says that ... soot or gunpowder tattooing ... are mentioned as being absent." June 4, 2002 AM Trial Tr. at 9. Likewise, examination relating to the DEA reports typically consisted of Walker confirming a lab number on an exhibit and stating the conclusion of the report regarding the tested drugs. *See, e.g.,* Oct. 23, 2002 PM Trial Tr. at 97, 98, 106, 111, 114, 118–20, 122–25.

[33] First, "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" are testimonial statements. *Melendez–Diaz,* 129 S.Ct. at 2532 (citation and quotation marks omitted). Put another way, "[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial." *Bullcoming,* 131 S.Ct. at 2717 (quoting *73*Melendez–Diaz,* 129 S.Ct. at 2532). The Supreme Court concluded the certifications in the laboratory report analyzing Bullcoming's BAC were testimonial because "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations," the certifying forensic analyst "tested the evidence and prepared a certificate concerning the result of his analysis," the certificate was formalized in a signed document and headed a "report," and the document referenced court rules relating to the admissibility of certified blood-alcohol analyses. *Id.* at 2717.

Analogous circumstances make the autopsy reports here testimonial.[FN16] The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner]—use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports." These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez–Diaz,* 129 S.Ct. at 2532 (citation and quotation marks omitted).

FN16. Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. *See Melendez–Diaz,* 129 S.Ct. at 2532; *cf. Michigan v. Bryant,* ––– U.S. ––––, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

Second, as to the suggestion that the DEA reports contained only "raw data," the Supreme Court rejected the same characterization that "Bullcoming's true accuser ... was the [gas chromatography] machine, while [the] testing analyst['s] ... role was that of mere scrivener." *Bullcoming,* 131 S.Ct. at 2714 (citation and internal quotation marks omitted). The Court emphasized that the analyst "reported more than a machine-generated number" when he

> certified that he received Bullcoming's blood sample

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intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition ... affect[ed] the integrity of the sample or ... the validity of the analysis." These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.

*74 *Id.* (alterations and ellipses in original) (internal citations omitted). Likewise here, the forensic chemists who authored the DEA reports made several representations, for example, that they were trained DEA chemists who followed certain procedures regarding the marking of containers and the inspection of seals, and that the chemical reagents and/or analytical instruments used were free from contamination and operating properly. The record in this court submitted by the parties does not indicate appellants had an opportunity to cross-examine the forensic chemists about their representations. And just as the Supreme Court concluded that the performance of a blood-alcohol analysis using gas chromatography was a "matter ... not so simple or certain," *id.* at 2711 n. 1, and subject to "human error ... at each step," *id.* at 2711, the DEA drug analysis process requires forensic chemists to weigh substances, make calculations, and choose the correct "color test for a particular kind of exhibit," Oct. 23, 2002 PM Trial Tr. at 130, a process also subject to human error. Indeed, one type of test used by the DEA forensic chemists involved gas chromatography. *See id.*

[34] Non-structural constitutional error, such as violation of the Confrontation Clause, requires vacation of a conviction only where the error was not harmless beyond a reasonable doubt. *See Wilson,* 605 F.3d at 1014 (citing *Chapman,* 386 U.S. at 24, 87 S.Ct. 824). As regards the autopsy reports, there was other evidence at trial that the 31 murders occurred by gunshots fired by members of the charged conspiracy. For example, there was testimony by cooperating co-conspirators that Gray claimed credit for shooting Anthony Dent and that Handy claimed credit for murdering Demetrius Green, and there was eyewitness testimony that Handy shot Richard Simmons. Assuming error with respect to admission of the autopsy reports, and thus not reaching the question left open in *Bullcoming,* 131 S.Ct. at 2711–12 (Sotomayor, J., concurring in part), we hold the error was harmless beyond a reasonable doubt.

With respect to those drug convictions dependent on a specific weight and/or quality and quantity (Counts 126–138 of the superseding indictment), any improperly admitted DEA reports, which were testimonial and within the ambit of the requirements of the Confrontation Clause, may have caused prejudicial error. The parties' briefs could not address *Bullcoming,* which was decided by the Supreme Court after oral argument, and the parties did not address which specific counts of the superseding indictment may or may not be sustained on other grounds. Accordingly, we remand to the district court to determine whether the admission of the DEA reports was error under *Bullcoming* and which counts underlying the judgment of conviction must be vacated, *see Smith,* 640 F.3d at 364, because the government cannot establish that the error was harmless beyond a reasonable doubt.

## X.

Under the Jencks Act, prosecutors must disclose "any statement" of a government witness "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). A statement includes "a written statement made by said witness and signed or otherwise adopted by him," as well as any "substantially verbatim recital" of the witness's oral statements "recorded contemporaneously with the making of such oral statement." *Id.* § 3500(e). In the course of its lengthy investigation of appellants, the government created reports of many witness interviews. Appellants argue that the district court abused its discretion when it declined to review, *in *75 camera,* all of the reports of interviews of government witnesses who later testified at trial, in order to determine whether any of those records contained Jencks Act statements. We disagree.

[35] A district court has an "affirmative duty" to

"engage in an adequate inquiry into the nature of the documents before ruling against Jencks Act production." *United States v. Stanfield,* 360 F.3d 1346, 1355 (D.C.Cir.2004). However, a defendant cannot compel a district court judge to sift through every record in the government's possession merely by speculating that somewhere in those records there might be Jencks Act statements. Rather, the defense must raise a "colorable claim" that a specific document or set of documents contains Jencks statements. *See, e.g., United States v. Price,* 542 F.3d 617, 621 (8th Cir.2008); *United States v. Roseboro,* 87 F.3d 642, 646 (4th Cir.1996).

The interview reports in question here were written by law enforcement officers, not by the witnesses themselves. Such reports generally do not qualify as Jencks Act statements; they are not usually a "substantially verbatim recital" of the witness's words or "adopted or approved by" the witness. *Cf. Price,* 542 F.3d at 621; *Roseboro,* 87 F.3d at 646. Moreover, even if the interviewer wrote down a few of the witness's exact words, there is no "substantially verbatim recital" if the interviewer engaged in "substantial selection" in quoting the witness. *United States v. Donato,* 99 F.3d 426, 433 (D.C.Cir.1996) (quoting *Palermo v. United States,* 360 U.S. 343, 352–53, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959)). There is thus little reason to believe that the interview reports in this case generally contained Jencks statements, and no reason to insist that the district court review every such report.

[36] On two occasions, appellants cross-examined government witnesses in an attempt to establish a colorable claim that specific witnesses' prior interviews had produced Jencks statements. The closest appellants came was the following exchange:

> Defense: Do you recall whether or not while you were speaking and the times when these people were taking notes whether they asked you to slow down so they could write something down that you were saying?
>
> Witness: No.
>
> Defense: Did you [sic] anyone ask you to repeat yourself?
>
> Witness: Probably so. I'm not sure.

A witness's guess that an interviewer probably asked him to repeat himself at some point during an interview does not create anything more than speculation that the report of that interview is a "substantially verbatim recital" of the interview. *Cf. Roseboro,* 87 F.3d at 646. Under those circumstances, the district court did not abuse its discretion in declining to review the resulting report, much less every interview report created during the investigation.

## XI.

At trial, the government elicited testimony from two former members of the Moore and Gray conspiracy that they had converted to Islam and that their religious conversion motivated them to testify for the prosecution. On cross-examination, the defense attempted to demonstrate that the conversions of those two witnesses were a sham. The defense also questioned the legitimacy of many other government witnesses' religious beliefs, even though the government had not raised the issue on direct examination of those witnesses. The government in turn sought to defend the genuine nature of its witnesses' religious beliefs.

***76** [37] Appellants contend that the government's elicitation of testimony with respect to its witnesses' faith violated Federal Rule of Evidence 610. That rule states: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

The government responds that the testimony of the two witnesses did not fall within Rule 610 because the evidence was offered "for the purpose of showing interest or bias because of" religious beliefs. FED.R.EVID. 610 advisory committee's notes. According to the government, the witnesses' religious conversion refuted an accusation of bias—namely, the accusation that the witnesses were testifying solely to receive favorable plea agreements. The government thus argues that this testimony went to the witnesses' motive, not their credibility.

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We need not decide which side has the better argument, because even assuming *arguendo* that there was error in allowing this testimony, the error was harmless. *See* FED.R.CRIM.P. 52(a). The government elicited very little religious testimony of its own accord. It made no mention of that testimony in opening or closing; it never urged the jury to credit its witnesses on account of their faith. *Cf. United States v. Spinner,* 152 F.3d 950, 961–62 (D.C.Cir.1998). Whatever slight influence those two witnesses' religious conversions could have had on the jury is insignificant alongside the overwhelming evidence of appellants' guilt in this case. *See Kotteakos v. United States,* 328 U.S. 750, 765, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Moreover, the defense thoroughly probed the issue of religious faith not only with the two witnesses who discussed their religion on direct examination, but with many others as well. Appellants admit that they did so both to impugn the government witnesses' credibility and to support their own claim that the government witnesses used Friday prison prayer services to coordinate false testimony against appellants. On this record, the defense's extensive cross-examination on this topic cannot be used to transform a government error (assuming error) that was a relatively minor part of the trial into a reversible error. *See Lurk v. United States,* 296 F.2d 360, 361 (D.C.Cir.1961).

## XII.

[38] Nunn maintains that the district court erred in denying his motion for a new trial. *See United States v. Gray,* 292 F.Supp.2d 71, 91–94 (D.D.C.2003). Although the motion raised four issues, this part addresses only Nunn's contention that the testimony of Steve Graham was procured by the government in violation of the federal bribery statute, 18 U.S.C. § 201(c)(2), which provides that "[w]hoever ... gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial ... shall be fined ... or imprisoned for not more than two years, or both." FN17 Graham testified that Nunn was Gray's drug supplier and described two drug transactions between Gray and Nunn. *See* Nov. 4, 2002 AM Trial Tr. at 14–26. Our review of the district court's denial of a new trial is for abuse of discretion. *United States v. Johnson,* 519 F.3d 478, 487 (D.C.Cir.2008).

> FN17. Nunn's claims regarding Federal Rule of Evidence 404(b) and severance pursuant to Federal Rule of Criminal Procedure 14 are addressed in Parts V and XXII, respectively.

Graham was indicted for participating in the charged drug and RICO conspiracies, but his trial was severed from that of the *77 other co-conspirators. After refusing offers by the government to enter into a plea agreement and cooperate with the government, he was convicted by a jury of conspiracy to distribute heroin or cocaine base and possession with intent to distribute heroin. The district court sentenced Graham to two concurrent 210–month terms of incarceration, followed by two concurrent sentences of five years' incarceration, and three years of supervised release. *See United States v. Graham,* 317 F.3d 262, 265–66 (D.C.Cir.2003). More than a year after sentencing, this court in December 2001 appointed new counsel to represent Graham on appeal. New counsel explained the benefits of cooperating with the government and the terms of such cooperation, something that Graham claims his trial counsel failed to do. *See* Nov. 6, 2002 AM Trial Tr. at 66–67, 70.

In March 2002, Graham contacted the prosecutor's office to express his desire to cooperate. On October 11, 2002, the government and Graham entered into an agreement whereby Graham would cooperate fully with the government and testify truthfully at appellants' trial. The agreement stipulated that "the usefulness of the information supplied ... could not have reasonably been anticipated by [Graham] until more than a year after his sentencing and that [Graham] promptly provided information to the government after its utility was reasonably apparent to him." *Gray,* 292 F.Supp.2d at 92. This language tracks an amendment now found in Federal Rule of Criminal Procedure 35(b)(2)(C), FN18 effective December 2002, providing an additional basis for granting a sentencing reduction based on a defendant's substantial assistance to the government. The agreement also memorialized the government's intention to file a

Rule 35 motion. *See Gray,* 292 F.Supp.2d at 92.

> FN18. Federal Rule of Criminal Procedure 35(b)(2)(C) provides:
>
> > (2) Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
> >
> > * * *
> >
> > (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.
>
> The advisory committee notes that "[w]hat constitutes 'prompt' notification will depend on the circumstances of the case." FED.R.CRIM.P. 35 advisory committee's note to 2002 amendments.

In Nunn's view, Graham cooperated with the government and testified against appellants because the government agreed to file an untimely and improper Rule 35(b) motion on his behalf. This agreement constituted, in Nunn's words, a "Faustian bargain," Appellants' Br. at 194, because it represented that Graham realized the importance of the information he possessed only upon appointment of new appellate counsel more than one year after sentencing, when, according to Nunn, Graham possessed this information at the time of his arrest and knew of its potential value. Nunn thus contends that the government, aware that Graham was ineligible for a Rule 35(b)(2)(C) sentence reduction, nonetheless unlawfully offered Graham leniency in exchange for his cooperation.

*United States v. Ramsey,* 165 F.3d 980 (D.C.Cir.1999), is controlling. Ramsey was convicted of a drug crime based on testimony by an informant named Fierro. Ramsey challenged his conviction on the ground that the federal bribery statute made it unlawful for the government to offer Fierro leniency in exchange for his cooperation and testimony. This court affirmed, holding that the bribery statute ***78** was not by its terms applicable to the United States when read in conjunction with the Dictionary Act, 1 U.S.C. § 1, and reasoned that a contrary conclusion would deprive the federal government of its longstanding ability to plea bargain, thereby creating absurd results. *See Ramsey,* 165 F.3d at 986–91. As additional justification, this court concluded that "even if federal prosecutors were subject to [the federal bribery statute], that fact would not justify excluding Fierro's testimony" under the exclusionary rule because Congress had prescribed only a monetary fine and imprisonment as punishments. *Id.* at 991.

Counsel for Nunn conceded at oral argument that "the cases are legion[ ] that the government is allowed to exchange leniency for testimony." Oral Arg. Tr. at 55. Even if the federal bribery statute were applicable, a violation would not change the course of Nunn's trial because the exclusionary rule would not operate to prevent the government from eliciting Graham's testimony. *United States v. Singleton,* 165 F.3d 1297 (10th Cir.1999) (en banc), is not to the contrary. Nunn relies on a concurring opinion for the proposition that "[p]rosecutors may offer only those incentives that Congress has approved, and may bargain and execute agreements only within the narrow, specific procedures that Congress and the courts have articulated." *Id.* at 1308 (Lucero, J., concurring). The majority likewise stated: "Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign." *Id.* at 1302 (majority opinion). A motion under Rule 35 is functionally little different from the plea bargain at issue in *Singleton* and the leniency afforded to the informant in *Ramsey,* save for the timing. *Cf. United States v. Ridge,* 329 F.3d 535, 541 (6th Cir.2003); *United States v. Vargas–Deleon,* 124 Fed.Appx. 854, 858–59 (5th Cir.2005). Because the district court acted within its discretion in crediting Graham's stipulation that he realized the usefulness of the information he possessed only upon the explanation by new appellate counsel, the government's Rule 35 motion meets the *Singleton* test, even assuming *arguendo* its applicability here.

Accordingly, we hold that the district court did not abuse its discretion in denying Nunn's motion for a new trial motion based on Graham's testimony.

## XIII.

Gray's contention that the district court abused its discretion in denying his request for a destruction of evidence instruction is manifestly without merit. This court has no authority to depart from *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), requiring bad faith destruction, *see Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), a showing Gray concedes he cannot make, *see* Appellants' Br. at 204.

## XIV.

Appellants requested that the district court instruct the jury on its theory that the government demonstrated, at most, that they engaged in multiple independent conspiracies, not a single joint conspiracy. Appellants submitted several proposed instructions to the court on this theory; the district court refused to give appellants' proposed instructions, four of which are now at issue on appeal. *See* Nov. 20, 2002 PM Trial Tr. at 47–56.

We have held that a "theory-of-defense instruction is in order if there is 'sufficient evidence from which a reasonable jury could find' for the defendant on his theory." *79*United States v. Hurt,* 527 F.3d 1347, 1351 (D.C.Cir.2008) (quoting *United States v. Glover,* 153 F.3d 749, 754 (D.C.Cir.1998)). However, we have also made clear that a failure to provide a requested defense instruction is not reversible error unless the instruction: "(1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *United States v. Taylor,* 997 F.2d 1551, 1558 (D.C.Cir.1993) (quoting *United States v. Grissom,* 645 F.2d 461, 464 (5th Cir.1981)) (internal quotation marks omitted).

[39] No one disputes that appellants were entitled to an instruction on their theory that the government had proven, at most, multiple conspiracies rather than a single conspiracy. Indeed the district court gave such an instruction:

> The defendants contend that the government's proof at trial is at variance from the conspiracy charged in Count One of the indictment; that is, that the evidence presented at trial, if believed, would constitute multiple conspiracies rather than a single overall conspiracy. Whether a single conspiracy, multiple conspiracies or no conspiracy at all existed is for you to decide.... Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment. What you must determine is whether the single conspiracy as charged in Count One existed between two or more conspirators. If you find that no such conspiracy existed, you must acquit the defendants of this charge. If, however, you find the government has proved beyond a reasonable doubt that the defendants were involved at any point during the period charged in the indictment in an integrated, ongoing, common effort to distribute controlled substances, then you may find them guilty of the single conspiracy charged in Count One. In making this determination, you should consider whether the conspirators share a common goal.... You may also consider the extent to which members of the conspiracy depended on one another to accomplish the goal of narcotics distribution, the overlap of participants in the various operations of the conspiracy, and the quality, frequency, and duration of each conspirator's transactions.

Dec. 9, 2002 AM Trial Tr. at 108–10. Rather, the question here is whether the court's refusal to provide the specific instructions requested by appellants constitutes reversible error. We hold that it did not.

Appellants requested the following instructions:

> *Instruction 3.* To determine whether the evidence supports a single conspiracy as opposed to multiple conspiracies, you must examine whether the defendants shared a common goal, any interdependence among the participants, and any overlap among the participants in the allegedly separate conspiracies. The

overlap requirement is satisfied only if the main figures in the alleged conspiracy are involved in all of the conspiracy's alleged scheme.

*Instruction 4.* In this case, the government alleges what is known as a 'hub and spoke' conspiracy. The government alleges that Mr. Gray and Mr. Moore were at the hub of the conspiracy, and that the other defendants, in addition to other conspirators, were the 'spokes.' However, in order to prove such a conspiracy, it must be shown that there is a direct conspiratorial interrelationship, also known as 'interdependence,' among those on the 'spokes' of the conspiracy, ***80** in addition to their relationship to those at the hub.

*Instruction 5.* In order for the defendants to be convicted of Count One, the evidence must demonstrate beyond a reasonable doubt that each defendant knew or had reason to know the scope of the distribution and retail organization involved, and had reason to believe that their own benefits derived from the operation [were] dependent upon the success of the entire venture.

*Instruction 6.* A single conspiracy exists if there is one overall agreement among various parties to perform different functions in order to carry out objectives of [the] conspiracy, while multiple conspiracies exist if each of the conspirators' agreements has its own end and constitutes an end in itself.

We cannot conclude that the failure to provide any of the proposed instructions "seriously impaired the defendant's ability to effectively present a given defense." *Taylor,* 997 F.2d at 1558. In light of the district court's comprehensive instructions to the jury about the defense's multiple-conspiracies theory, which mentioned all of the factors relevant to the jury's determination, we find that appellants were able to effectively present their defense.

## XV.

[40] Count 2 charged Moore with engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848. To convict under § 848, the government must prove that the defendant committed: "1) a felony violation of the federal narcotics law; 2) as part of a continuing series of violations; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; 5) from which he derives substantial income or resources." *United States v. Hoyle,* 122 F.3d 48, 50 (D.C.Cir.1997) (citation and quotation marks omitted). A "continuing series of violations," 21 U.S.C. § 848(c)(2), requires participation in three or more predicate offenses, one of which may be a drug conspiracy charged under 21 U.S.C. § 846. *See United States v. Harris,* 959 F.2d 246, 252–54 (D.C.Cir.1992), *overruled on other grounds, Bailey v. United States,* 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995); *see also* Dec. 9, 2002 AM Trial Tr. at 120. The jury convicted Moore upon finding seven proven predicate offenses. Moore challenges his CCE conviction on the ground that there was insufficient evidence to support the jury's finding of three or more predicate offenses. This court "must accept the jury's guilty verdict" where a rational trier of fact could have reasonably found that Moore committed at least three predicate offenses. *United States v. Dykes,* 406 F.3d 717, 721 (D.C.Cir.2005).

The predicate offenses found by the jury included (1) the drug conspiracy charged in Count 1, *see* 21 U.S.C. § 846; (2) Gray's possession with intent to distribute cocaine base on October 5, 1996 (Count 1, Overt Act 78); and (3) Raynor's possession with intent to distribute heroin on February 8, 1997 (Count 1, Overt Act 90). The latter two were attributable to Moore as a co-conspirator pursuant to *Pinkerton v. United States,* 328 U.S. 640, 645–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946): "As long as a substantive offense was done in furtherance of the conspiracy, and was reasonably foreseeable as a 'necessary or natural consequence of the unlawful agreement,' then a conspirator will be held vicariously liable for the offense committed by his or her co-conspirators." *United States v. Washington,* 106 F.3d 983, 1012 (D.C.Cir.1997) (quoting *Pinkerton,* 328 U.S. at 647–48, 66 S.Ct. 1180); *see also United States v. Baker,* 432 F.3d 1189, 1235 (11th Cir.2005); *United States v. Hoover,* 246 F.3d 1054, 1057–58 (7th Cir.2001).

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*81 Moore's challenge to these CCE predicate offenses rests on his contention that the charged conspiracy terminated before the statute of limitations period, when it split into separate conspiracies operating in different quadrants of the city more than five years prior to the filing of the superseding indictment. It follows, Moore maintains, that the government's failure to prove the charged conspiracy negates the jury's finding that these CCE predicate offenses were proven beyond a reasonable doubt. Moore suggests his conviction for the Count 1 drug conspiracy would be vacated and he would not be vicariously liable under *Pinkerton* for Gray's and Raynor's acts because there was no charged conspiracy to be furthered. *See Washington,* 106 F.3d at 1012. Because we conclude that Moore and Gray jointly led the charged drug conspiracy within the limitations period, *see supra* Part VII, and Moore identifies no other grounds for disturbing the jury's verdicts as to these CCE predicate offenses, such as challenging the sufficiency of evidence that Gray and Raynor committed these Count 1 overt acts, they are properly considered CCE predicate offenses.

Accordingly, Moore's challenge to the jury's finding of these Count 1 CCE predicate offenses fails.FN19

> FN19. Any violation of the Confrontation Clause in admitting the DEA chemist report certifying the substance possessed by Raynor to be heroin, *see supra* Part IX, is rendered harmless beyond a reasonable doubt by Raynor's guilty plea to Overt Act 90, *see* Oct. 7, 2002 Trial Tr. at 131–33; *see also Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

## XVI.

[41] The government and Moore agree that Moore's convictions for the felony murder and the premeditated murder of Ronald Powell merge. We therefore vacate Moore's felony murder conviction for the murder of Powell.

## XVII.

The jury convicted Smith of murdering Eric Moore. During the initial police investigation of Moore's murder, another man, Antoine Ward, claimed to have killed Moore. Smith argues that the district court improperly excluded evidence of Ward's confession. We conclude that the district court did not abuse its discretion in excluding the Ward evidence.

Eric Moore was found shot to death in his bedroom closet, with a pillow on the floor nearby and the room ransacked. At trial, a government witness testified: that he drove Smith and an accomplice to Moore's apartment with the intent of robbing Moore; that Smith was carrying a handgun; that Smith and the accomplice returned from Moore's apartment carrying bags of clothes; and that Smith told the witness he had shot Moore in Moore's closet after placing a pillow over Moore's head to muffle the sound. Another government witness testified that Smith had confirmed those details in a conversation with the government witness.

Before the above evidence came to light, the police had found a fingerprint belonging to Ward in Eric Moore's apartment. Ward therefore became the first target of the police investigation into this murder. When questioned, Ward admitted that he knew Moore and initially claimed that he participated in Moore's robbery with three other men, one of whom killed Moore. Ward later altered his story, naming a different person as the murderer. Still later, Ward changed his account entirely, claiming that he killed Moore himself during an argument, and denying that any others were involved. Then, in his fourth *82 and last statement, Ward recanted his previous three accounts and denied any involvement in Moore's robbery or death. The government did not pursue charges against Ward because it did not find sufficient evidence to corroborate his involvement.

Ward's counsel informed the government that Ward would invoke his Fifth Amendment right against self-incrimination if called to testify at Smith's trial. Smith claims that the district court should have told the government to immunize Ward for purposes of testifying, and if the government refused, dismissed the charges against Smith.

[42] But the district court had no authority to immunize Ward, or to compel the government to immun-

ize Ward. The decision to grant immunity from prosecution rests solely with the Executive Branch. *See* 18 U.S.C. § 6003; *United States v. Doe,* 465 U.S. 605, 616–17, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) ("Congress expressly left this decision exclusively to the Justice Department.").

[43] Smith contends that the district court should have dismissed the murder charge against Smith because the government refused to immunize Ward, citing the D.C. Court of Appeals' decision in *Carter v. United States,* 684 A.2d 331, 339–46 (D.C.1996) (en banc). *Carter* allows trial courts to impose sanctions on the prosecution—including dismissal of charges—if the prosecution creates a "distortion of the fact-finding process" by unjustifiably refusing to grant immunity to a defense witness. *Id.* at 342–43. Even assuming that *Carter* applies here (given that Smith was charged with murder under the D.C.Code), the district court did everything that the *Carter* decision would require: The government had interviewed Ward when it investigated him, and decided not to grant him immunity because Ward's accounts were self-contradictory and likely to result in perjury. The district court accepted that as a valid reason for the prosecution not to immunize Ward, and declined to impose sanctions on the prosecution. The district court's decision was well within the bounds of *Carter. Cf. Butler v. United States,* 890 A.2d 181, 190 (D.C.2006); *Carter,* 684 A.2d at 342–43.

Smith also argues that the district court should have admitted into evidence the third of Ward's four contradictory statements regarding Eric Moore's murder, the statement in which Ward claimed to have killed Moore.

Ward's confession is hearsay, but under Federal Rule of Evidence 804(b)(3) such hearsay was admissible if: (1) the declarant was unavailable, (2) the statement was against the declarant's interest, and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement."[FN20] The party offering the statement bears the burden of establishing that the statement meets these requirements. *See United States v. Jackson,* 540 F.3d 578, 588 (7th Cir.2008); *83 *United States v. MacDonald,* 688 F.2d 224, 233 (4th Cir.1982).

[44] There is no dispute that Ward was unavailable because he had invoked his Fifth Amendment right against self-incrimination. There is also no dispute that Ward's confession to killing Eric Moore is a statement against his interest. The issue here is thus whether corroborating circumstances " *clearly* indicate" the trustworthiness of Ward's statement. FED.R.EVID. 804(b)(3) (emphasis added).

Rule 804(b)(3)'s standard is demanding. The requirement for clear indications of trustworthiness serves to prevent someone whose reliability cannot be tested by cross-examination (such as Ward) from exonerating a guilty party by incriminating himself. The rule thus contemplates that some out-of-court admissions of guilt will be excluded, despite their relevance, because they possess insufficient indications of trustworthiness. *See United States v. Salvador,* 820 F.2d 558, 561 (2d Cir.1987); *United States v. Silverstein,* 732 F.2d 1338, 1346–47 (7th Cir.1984); *MacDonald,* 688 F.2d at 233; *see also United States v. Edelin,* 996 F.2d 1238, 1241–42 (D.C.Cir.1993).

Smith's argument that Ward's confession is "clearly" corroborated for purposes of Rule 804(b)(3) rests largely on general facts that do not directly confirm Ward's claim to have killed Eric Moore. Ward's

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FN20. Under the version of Rule 804(b)(3) in effect during Smith's trial, the requirement for clear corroboration only applied to statements, such as Ward's, "tending to expose the declarant to criminal liability and offered to exculpate the accused." That portion of the rule was amended in 2010. The new text applies to any statement "offered in a criminal case as one that tends to expose the declarant to criminal liability." FED.R.EVID. 804(b)(3) (2011). That change is not relevant here; both versions of the rule apply to Ward's statement. The 2010 amendment broadened the rule so that it applies to statements against penal interest offered by the prosecution as well as statements offered by the defense (such as Ward's confession here). *See* FED.R.EVID. 804(b)(3) advisory committee's note to 2010 amendments.

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fingerprint proves that Ward was in Moore's apartment at some point. But in his statement, Ward claimed that he was in an ongoing romantic relationship with Moore and regularly stayed with him. The fingerprint thus does not corroborate Ward's claim that he was present during the murder, much less that he committed it. Smith's other examples of corroborating evidence suffer from similar problems: Evidence tending to demonstrate that Ward knew certain things about Moore only corroborate Ward's claim that he knew Moore, not that he killed him.

Against those general facts, Smith must deal with the fact that Ward contradicted his statement multiple times. Ward made four separate statements to police regarding Eric Moore's death. In three of those four statements, Ward denied killing Moore. Moreover, the details of Ward's story vary significantly in each of the four accounts he gave, and he denied killing Moore both before and after claiming that he did. Other circuits have held that such contradictions can alone render an otherwise admissible statement untrustworthy. *See United States v. Jackson,* 540 F.3d 578, 589–90 (7th Cir.2008); *United States v. Lumpkin,* 192 F.3d 280, 287 (2d Cir.1999); *see also United States v. Bumpass,* 60 F.3d 1099, 1102 (4th Cir.1995) (listing consistency of declarant's statements as a factor in assessing trustworthiness under Rule 804(b)(3)).

Under the deferential abuse of discretion standard, we cannot conclude that the district court erred in excluding Ward's statement. Rule 804(b)(3)'s requirement to show clear indications of trustworthiness is a strict one. On three separate occasions, Ward contradicted his claim to have killed Eric Moore. Under those circumstances, the general corroboration advanced by Smith was not so clear that we can say that the district court abused its discretion in excluding Ward's hearsay confession.

## XVIII.

[45] Smith also challenges the sufficiency of the evidence supporting his conviction for the murder of Anthony Dent. We have little trouble concluding that the evidence sufficed for a rational jury to find Smith's guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

*84 The government alleged that Smith assisted Moore and Gray in murdering Dent because Dent was delinquent in a debt to Moore. The government presented testimony from two witnesses who observed the circumstances of Dent's murder. Both witnesses saw Smith, Gray, and Moore searching Dent's block prior to the murder. The first witness testified that Moore, while in Smith's company, asked the witness where to find Dent. The first witness also noted that Smith and Gray were wearing dark clothes when the witness spoke with Moore. The second witness saw a single person in dark clothes shoot Dent, but could not see the shooter's face. The second witness also saw Smith, Gray, and Moore in the vicinity of the murder soon after the killing occurred.

The second witness also related a conversation that occurred years after the murder, when that witness had himself become a lieutenant to Gray. According to the second witness, Gray stated that Moore had agreed to pay $5,000 for Dent's murder. Gray told the witness that while Smith, Gray, and Moore searched for Dent, Smith argued with Gray over who would actually shoot Dent and receive the $5,000. Gray apparently won the argument, and, after locating Dent with Smith and Moore's help, killed Dent.

The eyewitness testimony of both witnesses placed Smith at the scene of the murder, working with his fellow murderers to locate their victim and acting as a lookout during the murder. The second witness's report of the later Gray conversation provided evidence that Smith knew the purpose of the search was to kill Dent and that Smith intended to bring about that result. That evidence is sufficient to support Smith's conviction. *Cf. United States v. Wilson,* 160 F.3d 732, 737–39 (D.C.Cir.1998).

Smith's challenges to this evidence are unavailing. He suggests alternate explanations of the eyewitness testimony and an alternate theory of the crime, but on sufficiency of the evidence review we must view the evidence in the light most favorable to the government.

*See United States v. Alexander,* 331 F.3d 116, 127 (D.C.Cir.2003). Smith also objects that the testimony of accomplices is unreliable (both government witnesses had been drug dealers in the Moore and Gray organization), but in this Circuit accomplice testimony alone can support a conviction. *See United States v. Lee,* 506 F.2d 111, 118 (D.C.Cir.1974). And Smith objects to the admission of the second witness's later conversation with Gray, but this court "must consider all admitted evidence—whether admitted erroneously or not—in reviewing the sufficiency of the evidence." *Alexander,* 331 F.3d at 128 (citing *Lockhart v. Nelson,* 488 U.S. 33, 39–42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988)).[FN21] We therefore reject Smith's challenge to his conviction for the murder of Anthony Dent.

> FN21. Even if we construed Smith's argument against admission of the Gray conversation as a separate argument under the Federal Rules of Evidence, that argument would fail. Under Federal Rule of Evidence 801(d)(2)(E), admissions "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. When Gray gave his account of the murder to the government witness, that witness was Gray's assistant and thus a member of the conspiracy. Contrary to Smith's argument, Smith also remained a member of the conspiracy at the time of this conversation. *See infra* Part XX (Smith's claim to have withdrawn from the conspiracy fails). And this court has held that recounting past violent acts to members of a violent gang is a statement in furtherance of the conspiracy because it provides useful information on the conspiracy's activities and motivates conspiracy members' continued participation. *See United States v. Carson,* 455 F.3d 336, 367 (D.C.Cir.2006).

### *85 XIX.

[46] Somewhat as a corollary to his sufficiency of evidence challenge as regards his conviction for the murder of Anthony Dent, Smith contends that his trial counsel failed to provide constitutionally adequate assistance in electing not to call Leo Benbow as a witness. Benbow, according to Smith, witnessed Dent's murder and would have identified Clayton Thomas as the shooter.

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficiency "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 688, 104 S.Ct. 2052; to establish prejudice " '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' " *id.* at 694, 104 S.Ct. 2052. *See also Porter v. McCollum,* ––– U.S. ––––, 130 S.Ct. 447, 452, 175 L.Ed.2d 398 (2009). This court typically remands an ineffective assistance of counsel claim raised for the first time on direct appeal to the district court for an evidentiary hearing "unless the trial record alone conclusively shows that the defendant either is or is not entitled to relief," *United States v. Shabban,* 612 F.3d 693, 698 (D.C.Cir.2010) (citation and quotation marks omitted), and provided that the defendant has raised a "colorable claim" by making "factual allegations that, if true, would establish a violation of his sixth amendment right to counsel," *United States v. Burroughs,* 613 F.3d 233, 238 (D.C.Cir.2010) (citation and quotation marks omitted).

There was sufficient evidence upon which the jury reasonably could find that Smith aided and abetted Gray in murdering Dent. *See supra* Part XVIII. Smith defended against this charge at trial by offering evidence, pursuant to *Winfield v. United States,* 676 A.2d 1 (D.C.1996) (en banc); *see also United States v. Wilson,* 160 F.3d 732, 742–43 (D.C.Cir.1998), that Thomas, a third party with whom Smith had no affiliation, committed the crime. An understanding of how that defense unfolded at trial and the context in which Smith's counsel chose not to call Benbow to testify requires some background.

During opening statements, Smith's counsel forecasted to the jury that, as to the murder of Dent, "you will find that there is an eyewitness that identified other people and not Calvin Smith as being present and involved." May 13, 2002 AM Trial Tr. at 92. As groundwork for this defense, Smith introduced expert testimony that bullets fired from a gun used in the attempted murder of Michael Taylor were "tantalizingly close to being a perfect match" to those collected following Dent's murder a day later. Nov. 12, 2002 AM Trial Tr. at 33. The expert opined that it was "likely" the bullets were fired from the same pistol. *Id.* at 34. Building on this connection between the Taylor and Dent shootings, which occurred at the same location, *see* Nov. 14, 2002 PM Trial Tr. at 124; *see also* Counts 4–5, Superseding Indict. at 104–05, Smith intended to establish, through identifications made by Taylor and Benbow, that Thomas and two others, neither of them Smith, were involved in both crimes. *See* Nov. 14, 2002 PM Trial Tr. at 76.

Before any witnesses were called as to the identifications, the prosecutor advised the district court that the government's response to Smith's third-party defense might cause a potential issue to arise under*86 *Bruton v. United States,* 391 U.S. 123, 127–28, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which held that a defendant's Sixth Amendment right to cross-examination is violated when, in a joint trial, a non-testifying defendant's out-of-court admission is introduced against a codefendant. The prosecutor explained that one of the assailants identified by both Taylor and Benbow was a tall man named Rodney, who the government believed to be charged conspiracy co-principal Rodney Moore, and therefore the prosecutor would seek the identification of all three assailants on cross-examination of Benbow and other fact witnesses. *See* Nov. 14, 2002 PM Trial Tr. at 76. Counsel for Moore appeared to agree regarding the *Bruton* problem, stating that "given [the government's] proffer ... [t]his could really come back and bite us," but demurred when pressed by the district court to articulate the concern. *Id.* at 81–82.

The evidence concerning Taylor's identification of Thomas as one of his assailants consisted of testimony by two D.C. police officers who investigated the incident. Officer Will stated that the attempted murder occurred on "October 8 of 1990, [in the] 3100 block of 15th Place, Southeast, late evening," that he directed Detective Fluck to show photographs to Taylor for purposes of identifying the perpetrator, and that ultimately an arrest warrant was issued for Thomas. Nov. 14, 2002 PM Trial Tr. at 84. Detective Fluck, in turn, recounted visiting Taylor in the hospital to do a "photo spread," prompting the prosecutor to object to the admission of an out-of-court identification by Taylor. *See id.* at 86. Following a colloquy at the bench, the district court sustained the objection, thereby limiting the direct examination of Detective Fluck to the fact that an identification was made by Taylor, without revealing the name of the person (Thomas) identified. *See id.* at 86–89, 91. Detective Fluck testified on direct examination in accordance with the ruling.

Before cross-examination of Detective Fluck, however, the prosecutor noted that the direct examination had resulted in an "incomplete accounting of what Mr. Taylor said" to Detective Fluck insofar as "Mr. Taylor actually talked about three people being involved in the shooting." *Id.* at 97. Consequently, the prosecutor indicated his intent "to flesh out all of the identification," including the fact that a man named Rodney was involved. *Id.* at 97–98. The district court, likely mindful the prosecutor had raised the specter of a *Bruton* problem, inquired whether the prosecutor could "sanitize" the cross-examination and avoid a *Bruton* problem by "[a]sk[ing] the officer if it is true ... that Mr. Taylor also identified other individuals." *Id.* at 98. In response, however, the prosecutor stated that he "d[idn't] think it is a Brut[ ]on problem, because it isn't a defendant testifying against another defendant. I think that's the Brut[ ]on line [of authority], essentially limited to a defendant testifying against another." *Id.* The district court directed the prosecutor to sanitize the cross-examination. *Id.* at 99. The parties and the district court then engaged in the following exchange, which is central to Smith's allegation of constitutionally inadequate counsel:

> Moore's Counsel: I do just want to note a concern that even that sanitized testimony, when viewed together within the testimony of what I'm told to anticipate

from—the next witness may provide—could present a very serious continuing Brut[ ]on type problem for us.

The Court: What is next?

Smith's Counsel: Your Honor, I'll be frank with the Court. It is not my *87 intention to call Benbow to go into the Dent shooting.

> *If I did, I think we would have a mistrial.*
>
> * * *
>
> I will tell the Court that the government is free to call Benbow. They know where he is. He's out there in the witness program. If they choose. They want to open up this can of worms, they're free to do that.
>
> But I won't be introducing it, based on the limited ability of myself and my limited ability to go into this through these two officers. Severely hamstrung. First of all, I'm missing photographs that I can't go into with Benbow because they're not in the jacket. They're missing the photographs from [Dent] and Michael Taylor.

The Court: Look, I can't solve all the problems of the whole case here. Let's finish this witness. Do what I suggested.

*Id.* at 99–100 (emphasis added). Proceeding in this sanitized manner, the prosecutor elicited from Detective Fluck that, according to Taylor, "Thomas was one of three men who shot [Taylor]" and that "there were three men, all of whom were firing at [Taylor] at the same time." *Id.* at 101–02.

Based on the foregoing, we conclude that Smith has made a "colorable claim" that his counsel's decision not to call Benbow to testify was constitutionally deficient, and that he was prejudiced by his counsel's conduct. *See Burroughs,* 613 F.3d at 238. First, Smith has made a plausible claim that his counsel's decision not to call Benbow to testify fell below an objective standard of reasonableness. Why Smith's counsel believed that calling Benbow would precipitate a mistrial, *see* Nov. 14, 2002 PM Trial Tr. at 99, and how the district court's evidentiary rulings or other circumstances "[s]everely hamstrung" the presentation of the third-party defense, *id.* at 100, is difficult to discern from the current record. *Bruton* applies only where, unlike here, there is an "admission of incriminating out-of-court statements made by a nontestifying *codefendant,*" *United States v. Wilson,* 605 F.3d 985, 1017 (D.C.Cir.2010) (emphasis added), which Benbow was not. Moreover, although Smith's counsel was unable to elicit Taylor's identification of Thomas on direct examination of Detective Fluck, the jury could infer this fact from the issuance of an arrest warrant for Thomas and, in any event, Thomas was ultimately identified during the prosecutor's [illegible]-examination of Detective Fluck.

The parties' briefs discuss at length whether the government could have proved that the "Rodney" who purportedly participated in the Taylor shooting was Rodney Moore, and, if so, whether this factored into defense counsel's decision not to call Benbow. The government suggests that "[t]he possibility that Benbow would implicate Moore in one or both shootings would have prejudiced Moore, but more importantly, it would also have had a direct prejudicial impact on Smith's *own* defense," Appellee's Br. at 276, insofar as the government had introduced evidence in its case-in-chief that Moore, Gray, and Smith were searching for Dent shortly before the shooting, *see* May 21, 2002 AM Trial Tr. at 137–38. The current record, however, is inconclusive as to whether the allegations "reflect the trial counsel's informed tactical choice or a decision undertaken out of ignorance of the relevant law." *United States v. Reeves,* 586 F.3d 20, 26 (D.C.Cir.2009) (citation and quotation marks omitted). Similarly, Smith's assertion that his counsel erroneously believed there was a *Bruton* problem fails to find conclusive support in the current record. *See id.*

*88 Second, the extent to which an error, if any, prejudiced Smith's third-party defense is also unclear from the current record. The lack of clarity stems in part from an inability to pin down the precise nature of Benbow's testimony. In his brief, Smith proffers that Benbow would have testified: "[I] saw three men—Smith not being one of them—kill Dent." Appellants' Br. at 275. According to Smith, Benbow's eyewitness account of the Dent murder would have changed the course of the trial in light of the weak circumstantial evidence offered against Smith, thereby implicating Thomas and fully exonerating Smith of participating in the crime. The government disagrees, maintaining that the absence of Benbow's testimony was insufficient to satisfy the second *Strickland* prong because the evidence would not have been exculpatory of Smith. Recall that Smith, Gray, and Moore were seen together near the scene of the Dent murder shortly before and after it occurred and that the government introduced evidence to establish that Smith served as a lookout from an alley for Gray, the shooter. *See supra* Part XVIII. From this, the government concludes that Benbow's account of the Dent murder does not rule out Smith's participation because Benbow would not have seen Smith hiding in the alley. This may or may not be so, depending on a number of variables.

Benbow's proffered testimony ("[I] saw three men—Smith not being one of them—kill Dent") is subject to varying interpretations. On the one hand, it may be that Benbow saw three men simultaneously shoot at Dent, none of them Smith, and that Benbow was in a position to confirm that Smith was not standing in the alley. Smith was not completely hidden from view since Sanders was able to identify him. *See* May 21, 2002 AM Trial Tr. at 140, 142. On the other hand, in stating that three men "kill[ed] Dent," Benbow might have meant that three men participated in the murder, one of whom was the shooter and two of whom served as lookouts. Such a statement could be exculpatory of Smith depending on where the lookouts were standing and, again, if Benbow were in a position to see into the alley. The trial record does not make clear which interpretation is correct. *Compare* Nov. 14, 2002 PM Trial Tr. at 76 ("Benbow ... identified three people being *involved* in both shootings...." (emphasis added)), *with id.* at 124 ("Clayton Thomas is identified both in [Dent] and in the Michael Taylor [shootings] as being the *one* that shot." (emphasis added)), *with id.* at 125 ("Thomas is identified as *one of the three* shooters." (emphasis added)).

The current record also does not allow a conclusive determination that Benbow's testimony was immaterial or cumulative such that it defeats a colorable prejudice claim. *See United States v. Toms,* 396 F.3d 427, 434–35 (D.C.Cir.2005). The jury heard fact testimony that Taylor identified Thomas as a person who shot at him, *see* Nov. 14, 2002 PM Trial Tr. at 101–02, and expert opinion testimony that the bullets fired at Taylor and Dent were "tantalizingly close to being a perfect match," Nov. 12, 2002 AM Trial Tr. at 33. Benbow would have provided corroboration for Smith's third-party defense insofar as he witnessed Thomas shoot Dent, thereby strengthening the connection between Thomas and the two shootings. This evidence would not have been cumulative. It is conceivable that Smith could have pursued his defense based solely on Taylor's identification of Thomas in the first shooting and the similarity in the bullet markings between the shootings, but there was no other evidence in the record linking Thomas directly to Dent's murder. *See Sussman v. Jenkins,* 636 F.3d 329, 358–59 (7th Cir.2011). Notably, Benbow would have provided the only *89 eyewitness identification of the shooter at the scene. *See Harrison v. Quarterman,* 496 F.3d 419, 428 (5th Cir.2007). *But cf. United States v. McNeil,* 911 F.2d 768, 774 (D.C.Cir.1990). Without Benbow's eyewitness account of the Dent murder and identification of Thomas, the jury was left to infer from Smith's evidence that Thomas shot Dent and to weigh this inference against the testimony of government witnesses that Gray, with Smith's assistance, committed the murder and later claimed credit for it.

The government's theory at trial was that Gray murdered Dent while Smith served as a lookout. Smith's defense was that Thomas and his cohort murdered Dent. No evidence linked the two groups; there was only the government's conjecture that one of Thomas's accomplices, identified as "Rodney," was in fact Rodney Moore. There is a "colorable" argument that Benbow's testimony would not have precipitated a mistrial or hampered Smith's defense, yet would have significantly altered the balance of evidence, tipping the scales in Smith's favor. *See Porter,* 130 S.Ct. at 455–56; *Strickland,* 466 U.S. at 693–94, 104 S.Ct. 2052. Accordingly, because the current record does not conclusively resolve Smith's claim, we remand Smith's "colorable claim" of ineffective assistance of counsel under the Sixth Amendment to the district court so that it may hold an evidentiary hearing and address this claim in the first instance.

## XX.

In its instructions to the jury prior to deliberation, the district court explained: "If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before ... May 5th, 2000 for defendant Calvin Smith ... you must find the defendant[ ] not guilty of Count One." Dec. 9, 2002 AM Trial Tr. at 104–05. After deliberating for nearly 12 days, the jury asked the court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" Over appellants' objections, the district court told the jury that "[o]nce the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence."

Smith contends that the district court erred in instructing the jury that he rather than the government bore the burden of persuasion to show that he had withdrawn from the conspiracy. He believes that, because he met his burden of production to show that he withdrew from the charged conspiracy prior to the relevant statute of limitations period, due process required the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

[47] In a criminal trial due process requires the government to prove beyond a reasonable doubt all elements of the offense. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Dixon v. United States,* 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006); *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). As a consequence, when a defendant raises (by meeting his burden of production) a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense. *See Dixon,* 548 U.S. at 11, 126 S.Ct. 2437 ("We require[ ] the Government to prove the ***90** defendant's sanity beyond a reasonable doubt because the evidence that tended to prove insanity also tended to disprove an essential element of the offense charged." (citing *Davis v. United States,* 165 U.S. 373, 378, 17 S.Ct. 360, 41 L.Ed. 750 (1897))).

[48][49] Conspiracy is a crime that presumes continuity until accomplishment or termination; once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends. *Hyde v. United States,* 225 U.S. 347, 368–70, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). Therefore, once the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws. The question here then is whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of the conspiracy such that the government must prove that the defendant did not so withdraw.

Our sister circuits have differed on this issue. While some have said that the burden of proving withdrawal always rests on the defendant, *see, e.g., United States v. Eppolito,* 543 F.3d 25, 49 (2d Cir.2008); *United States v. Arias,* 431 F.3d 1327, 1340 (11th Cir.2005); *United States v. Brown,* 332 F.3d 363, 374 (6th Cir.2003); *United States v. Hughes,* 191 F.3d 1317, 1322 (10th Cir.1999); *United States v. Pettigrew,* 77 F.3d 1500, 1514 (5th Cir.1996), others have held that, once the defendant meets his burden of production that he has withdrawn prior to the relevent limitations period, the burden of persuasion shifts to the government, *see, e.g., United States v. Read,* 658 F.2d 1225, 1232–33 (7th Cir.1981); *United States v. Antar,* 53 F.3d 568, 582–83 (3d Cir.1995), *abrogated on other grounds by Smith v. Berg,* 247 F.3d 532 (3d Cir.2001); *United States v. Lothian,* 976 F.2d 1257, 1261–62 (9th Cir.1992); *United States v. West,* 877 F.2d 281, 289 (4th Cir.1989); *United States v. Dyer,* 821 F.2d 35, 39 (1st Cir.1987).

Our circuit, however, does not write on a blank slate. We previously have said unequivocally, albeit in the context of sentencing, that the defendant, not the government, "has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement." *United States v. Thomas,* 114 F.3d 228, 268 (D.C.Cir.1997); *see also United States v. Mitchell,* 49 F.3d 769, 784 (D.C.Cir.1995); *United States v. Dale,* 991 F.2d 819, 854 (D.C.Cir.1993). We are obliged to follow our precedent, and we thus hold that the district court correctly instructed the jury that the defendant bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period.

## XXI.

Smith and Raynor were convicted of killing in furtherance of a continuing criminal enterprise, 21 U.S.C. § 848(e)(1)(A) (2000), murder in aid of racketeering, 18 U.S.C. § 1959, and first-degree murder under D.C.Code § 22–2401 (1981) (current version at D.C.Code § 22–2101). *See also* 18 U.S.C. § 2 (aiding and abetting); D.C.Code § 22–105 (1981) (current version at D.C.Code § 22–1805) (same). The murders were committed by other members of the charged conspiracy, with Smith or Raynor participating. With regard to the principles of liability, the district court instructed the jury that "[a]n aider and abettor is legally responsible for the acts of other persons that are the *natural and probable consequences* of the crime in which he intentionally participates." Dec. *91 9, 2002 AM Trial Tr. at 95 (emphasis added).

Smith and Raynor challenge their federal and D.C. murder convictions on the ground that the "natural and probable consequences" formulation of the aiding and abetting instruction permitted the jury to render a guilty verdict without requiring the government to prove beyond a reasonable doubt that Smith and Raynor acted with the requisite specific intent to kill. Because they did not raise this objection in the district court, our review is for plain error. *See United States v. Wilson,* 605 F.3d 985, 1020 (D.C.Cir.2010). To prevail Smith and Raynor must therefore identify a legal error that was "plain," meaning "clear" or "obvious," and demonstrate that such error affected substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. 725, 732–37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (citation and quotation marks omitted). "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal ... [,] it is enough that an error be 'plain' at the time of appellate consideration." *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

[50] For the following reasons we conclude that even assuming error by the district court in using the "natural and probable consequences" instruction for the aiding and abetting charges, given the forfeiture of an argument by Smith and Raynor, the error was not prejudicial in view of the district court's instruction on coconspirator liability for acts reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *See Pinkerton v. United States,* 328 U.S. 640, 645–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

With respect to the first-degree murder convictions under the D.C.Code, *Wilson–Bey v. United States,* 903 A.2d 818 (D.C.2006) (en banc), controls. There, the D.C. Court of Appeals reversed a conviction for first-degree premeditated murder while armed, in violation of D.C.Code § 22–2401, because the "natural and probable consequences" aiding and abetting instruction "omitted the *mens rea* element of the offense charged," namely "premeditation, deliberation, and intent to kill." *Id.* at 822. The court rejected the "natural and probable consequences" formulation because its use was at odds with the longstanding requirement that an accomplice "knowingly associate [ ] herself with the commission of the crime, that she participate[ ] in the crime as something she wished to bring about, and that she intended by her actions to make it succeed." *Id.* at 835. To hold otherwise, the court reasoned, "would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind," *id.* at 837, and eviscerate the distinction between traditional first-degree murder and the unique foreseeability test of felony murder, *see id.* at 838–39. The government concedes as regards Smith's and Raynor's first-degree murder convictions under the D.C.Code that the district court's use of the "necessary and probable consequences" instruction was plain error. *See Perez v. United States,* 968 A.2d 39, 93 (D.C.2009).

With regard to the CCE and RICO murder convictions under the U.S.Code, this court in reversing the aiding and abetting conviction in *United States v. Wilson,* 160 F.3d 732 (D.C.Cir.1998), held that aiding and abetting liability requires proof of some shared intent by the aider and abettor with that of the principal actor. There, the jury convicted Ralph and Louis Wilson of a conspiracy to kill a witness named Leroy Copeland, killing a witness with intent*92 to prevent him from testifying, both in violation of the U.S. Code, and first-degree murder while armed in violation of the D.C. Code. In addition, the jury found Marcellus Judd guilty of these crimes as an aider and abettor for his role in informing the Wilsons that Copeland could be found nearby. An aiding and abetting conviction required proof that Judd had: "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge (3) that the other was committing an offense; and (4) assisting or participating in the commission of the offense." *United States v. Gaviria,* 116 F.3d 1498, 1535 (D.C.Cir.1997). In concluding that there was insufficient evidence to convict Judd as an aider and abettor, this court reasoned:

> To prove aiding and abetting the government must show that Judd shared some intent with the Wilson brothers and took some affirmative action to assist them in carrying out their plan to kill Copeland. *See Gaviria,* 116 F.3d at 1535. Although the intent of the aider and abettor need not be identical to that of the principal, *see United States v. Walker,* 99 F.3d 439, 442 (D.C.Cir.1996), the government still was required to show that Judd had sufficient knowledge and participation to allow a reasonable juror to infer that he "knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed." [*United States v.*] *Teffera,* 985 F.2d [1082] at 1086 [ (D.C.Cir.1993) ] (quoting *United States v. Raper,* 676 F.2d 841, 849 (D.C.Cir.1982)).

*Wilson,* 160 F.3d at 738. Evidence that Judd knew the Wilsons were looking for Copeland was insufficient to show that he knew the Wilsons were intending to kill Copeland and that he had decided to assist them in that enterprise. *See id.*

The shared-intent standard for aiding and abetting in a conspiracy case is at odds with the "natural and probable consequences formulation" of the aiding and abetting instruction insofar as the jury may substitute a foreseeability test for the *mens rea* requirement. Such use of the "natural and probable consequences" formulation functionally transforms aiding and abetting liability into conspiratorial liability, when the Supreme Court has recognized the two are distinct. *Nye & Nissen v. United States,* 336 U.S. 613, 620, 69 S.Ct. 766, 93 L.Ed. 919 (1949) ("Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy."); *see id.* at 630, 69 S.Ct. 766 (Murphy, J., dissenting) (the former involving "real participation" and the latter "more remote plotting"); *accord Wilson–Bey,* 903 A.2d at 839–42. Appellants contend that the district court erred in instructing the jury with respect to the federal murder charges that "[a]n aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequences of the crime in which he intentionally participates." Dec. 9, 2002 AM Trial Tr. at 95. Although the above-referenced quote from *Wilson* might tend in appellants' direction, we note that the Supreme Court in 2007 cited *United States v. Walker,* 99 F.3d 439, 443 (D.C.Cir.1996), in listing states and circuits that continue to apply the " 'natural and probable consequences' doctrine." *Gonzales v. Duenas–Alvarez,* 549 U.S. 183, 190–91, 197, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). Although the instructional issue was not raised in *Walker,* this court described the "natural and probable consequences" instruction with approval. *See* 99 F.3d at 443 (citing *United States v. Sampol,* 636 F.2d 621, 676 (D.C.Cir.1980)). Fortunately, we need not resolve any actual or apparent conflict between*93 *Walker* and *Wilson* in order to decide the present issue, because the plain error standard of review applies. We can hardly say the district court plainly erred by following the same construction of precedent as the Supreme Court. We further note that Smith and Raynor fail to show how any such error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano,* 507 U.S. at 732, 113 S.Ct. 1770 (citation and quotation marks omitted). This is because the district court's co-conspirator liability instruction cured any prejudice.

As a threshold matter, Smith and Raynor cursorily contend that their murder convictions may not be sustained under this alternative theory of liability because it is impossible to know whether the jury arrived at its verdict by following the district court's aiding and abetting instruction or its *Pinkerton* instruction. They provide no citation for this argument, *see* Appellants' Br. at 303 n. 167, and it is mentioned only in a footnote. Hence the argument is forfeited. *See Bush v. District of Columbia,* 595 F.3d 384, 388 (D.C.Cir.2010) (citing FED. R. APP. P. 28(a)(9)(A)); *Am. Wildlands v. Kempthorne,* 530 F.3d 991, 1001 (D.C.Cir.2008).[FN22]

[51] The D.C. Court of Appeals' post- *Wilson–Bey* decisions in *Wheeler v. United States,* 977 A.2d 973 (D.C.2009), and *Neal v. United States,* 940 A.2d 101 (D.C.2007), are instructive. In both cases, the court held that, despite an erroneous aiding and abetting instruction, a *Pinkerton* instruction preserved the convictions for a given crime because the jury, having convicted the aider and abettor of a charged conspiracy, could have found that the crime was foreseeable and committed in furtherance of the charged conspiracy. Smith and Raynor correctly respond that *Wheeler* concerned a conspiracy to commit a single overt act of murder, and the jury necessarily found that Wheeler acted with the specific intent to kill in convicting him of conspiracy to commit murder. *94977 A.2d at 984. Here, by contrast, the conspiracy count contains 236 overt acts and such a

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FN22. We note, however, that the Supreme Court held in *Yates v. United States,* 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." The Court narrowed this holding in *Griffin v. United States,* 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), to situations in which one of the grounds upon which the jury could have reached its verdict was legally, as opposed to factually, inadequate. *See United States v. Johnson,* 216 F.3d 1162, 1165 n. 2 (D.C.Cir.2000). Although the prejudice inquiry might normally be cut short by application of the *Yates* rule where, as here, the challenge is to the legality of the aiding and abetting instruction, this court has suggested that review under the plain error standard, as opposed to the harmless error standard, in a *Yates* case "would significantly affect the way in which [the court] analyze[s] [the] appeal" to the extent there is overwhelming evidence to support the conviction under the proper jury instruction, but had no occasion to decide which was the appropriate standard. *United States v. Perkins,* 161 F.3d 66, 73–74 (D.C.Cir.1998). Other circuits have held that *Yates* does not apply under the plain error standard because the burden of establishing harm is on the defendant. *See United States v. Hastings,* 134 F.3d 235, 242–44 (4th Cir.1998); *see also United States v. Colvin,* 353 F.3d 569, 576–77 (7th Cir.2003) .

Here, for two reasons, we will assume without deciding that under plain error review *Yates* does not require Smith's and Raynor's murder convictions to be set aside even though we do not know whether the jury convicted for aiding and abetting or under *Pinkerton.* First, Smith and Raynor have forfeited the argument by citing no authority and by raising it in a footnote. *See Bush,* 595 F.3d at 388; *Am. Wildlands,* 530 F.3d at 1001. Second, Smith and Raynor shoulder the burden of demonstrating that instructional error prejudiced their defense under the plain error standard, *see* Appellants' Br. at 302, a position their counsel reiterated during oral argument, *see* Oral Arg. Tr. at 80.

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conclusion cannot be drawn. But their argument misunderstands the relationship between the two types of liability and conflates the two alternative approaches taken in *Wheeler*. *See id.* It is true that a conviction for conspiracy based on hundreds of possible overt acts does not permit the inference that the jury found the overt act murders to have been committed with the requisite intent. Such proof, however, is not required under the *Pinkerton* theory of liability. As the D.C. Court of Appeals explained in *Wheeler:*

> Under *Pinkerton* ... the intent necessary for conviction of murder as an aider and abettor under *Wilson–Bey* yields to virtually the same state of mind—the lesser foreseeability or natural and probable consequences standard—found erroneous in the court's aiding-and-abetting instruction. In short, a conspiracy—an agreement not necessarily present among aiders and abettors—is deemed a *substitute* for the particular state of mind required for convicting a nonconspiratorial accomplice of murder under *Wilson–Bey.* A jury finding that Wheeler had the state of mind required for conviction of first-degree murder was therefore not necessary for conviction under the *Pinkerton* theory.

*Id.* at 985 (emphasis added); *accord United States v. Vazquez–Castro,* 640 F.3d 19, 24 (1st Cir.2011). *Pinkerton* coconspirator liability exists, moreover, even where the substantive offense is not an overt act alleged in the indictment. *See United States v. Washington,* 106 F.3d 983, 1011 (D.C.Cir.1997). It requires only that the substantive offense be committed in furtherance of the conspiracy and reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. *See id.* at 1012. This is the relevant analysis here.

There was ample evidence for the jury reasonably to find that the murders for which Smith and Raynor were convicted were foreseeable and in furtherance of the charged conspiracy. Smith and Raynor's attempt to show otherwise is unpersuasive; they summarize the facts of each murder and claim either there was insufficient admissible evidence to support the murder conviction or there is no evidence establishing the murders were related to the conspiracy's dealings. As regards the former, those contentions are discussed and rejected elsewhere. *See supra* Part XVIII. As regards the latter, the superseding indictment and evidence at trial make clear that one of the principal goals of the drug conspiracy was killing to enhance the conspiracy's power, protect the reputation of the conspiracy and its members, and collect money owed to the conspiracy. *See* Superseding Indict. at 4–5. It was reasonable for the jury to find that each of the murders furthered one (if not more) of these goals. *See United States v. Carson,* 455 F.3d 336, 376 (D.C.Cir.2006).

Accordingly, any error regarding the "natural and probable consequences" instruction did not "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings," *Olano,* 507 U.S. at 732, 113 S.Ct. 1770 (citation and quotation marks omitted), because the evidence supports the jury's verdict on Smith's and Raynor's CCE, RICO, and first-degree murder convictions under the alternative *Pinkerton* theory of liability.

## XXII.

Following the government's proposal to try appellants together—in a trial separate from and prior to other charged co-conspirators—Nunn and Handy moved for severance of their trials from that of their codefendants. In a memorandum opinion, ***95** the district court denied Nunn's and Handy's motions, adopting the government's proposal to try all appellants in a single trial. *United States v. Gray,* 173 F.Supp.2d 1 (D.D.C.2001). Nunn and Handy argue on two bases that the district court erred by refusing to sever their trials. First, they argue that their codefendants were charged with more numerous and serious crimes, the evidence of which could have a "spillover" effect, akin to guilt-by-association, that would prejudice the jury against them. Second, they maintain that they should not have been forced to be tried alongside Moore and Gray, who were facing the death penalty, because it caused them prejudice to be tried by a death-qualified jury.

[52] Rule 14(a) of the Federal Rules of Criminal Procedure provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of

counts, sever the defendants' trials, or provide any other relief that justice requires." As is clear from the text of the rule, district courts have significant flexibility to determine how to remedy any potential risk of prejudice posed by the joinder of multiple defendants in a single trial. *See United States v. Lane,* 474 U.S. 438, 449 n. 12, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). Thus "Rule 14 does not require severance even if prejudice is shown," *Zafiro v. United States,* 506 U.S. 534, 538–39, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), and in many circumstances district courts may order lesser forms of relief to cure any prejudice. Indeed, although a district court may grant a severance in a wider array of circumstances, the Supreme Court has held that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539, 113 S.Ct. 933. The Court has further explained that even "[w]hen the risk of prejudice is high, ... less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.*

[53] We review the district court's decision not to sever the trials of defendants under Rule 14(a) only for abuse of discretion. *Id.* at 541, 113 S.Ct. 933; *United States v. Brown,* 16 F.3d 423, 426–27 (D.C.Cir.1994). In reviewing the exercise of the district court's discretion, we keep in mind that " '[t]he balance has been struck in favor of joint trials.' " *United States v. Hines,* 455 F.2d 1317, 1334 (D.C.Cir.1972) (alterations in original) (quoting *United States v. Krechevsky,* 291 F.Supp. 290, 294 (D.Conn.1967)). We hold that the district court did not abuse its discretion when it declined to sever the trials of Handy and Nunn from that of the other appellants.

[54] We turn first to the question of "spillover" prejudice: Acknowledging that it may prejudice a defendant to be tried together with another defendant accused of more serious or more numerous crimes, we have held that "severance is required when the evidence against one defendant is 'far more damaging' than the evidence against the moving party." *United States v. Bruner,* 657 F.2d 1278, 1290 (D.C.Cir.1981) (quoting *United States v. Mardian,* 546 F.2d 973, 977 (D.C.Cir.1976) (en banc)). However, "[a]bsent a *dramatic* disparity of evidence, any prejudice caused by joinder is best dealt with by instructions to the jury to give individual consideration to each defendant." *United States v. Slade,* 627 F.2d 293, 309 (D.C.Cir.1980) (emphasis added). In other words, some disparity in evidence does not compel severance;*96 rather, when there is "substantial and independent evidence of each [defendant's] significant involvement in the conspiracy," severance is not required. *United States v. Tarantino,* 846 F.2d 1384, 1399 (D.C.Cir.1988); *see also Slade,* 627 F.2d at 310 (finding severance not required despite disparity in evidence because evidence against defendant was "independent and substantial").

In this case, although Handy and Nunn were alleged to have committed fewer crimes and arguably had a less extensive role in the charged conspiracy than the other defendants tried with them, the disparity of evidence did not rise to a level necessary to mandate severance. The government presented substantial and independent evidence of Handy's and Nunn's involvement in the charged conspiracy and crimes in furtherance thereof. Furthermore, the district court gave the following instruction to the jury:

> Unless I have instructed you otherwise, you should consider each instruction that the Court has given you to apply separately and individually to each defendant on trial. Likewise, you should give separate consideration and render separate verdicts with respect to each defendant. Each defendant is entitled to have his guilt or innocence of the crime for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. The guilt or innocence of any one defendant should not control or influence your verdict as to the other defendants. You may find any one or more of the defendants guilty or not guilty.

Dec. 9, 2002 AM Trial Tr. at 90.

Although we do not ignore the possibility that some "spillover" prejudice may have resulted to Handy and

Nunn from being tried together with their codefendants, the district court's jury instructions, by explaining that each defendant's guilt should be considered individually based upon the evidence that pertained to him, were sufficient to cure any such prejudice.

Furthermore, Handy and Nunn were not entitled to severance merely because their guilt was adjudicated by a death-qualified jury. Facing a death-qualified jury did not "compromise a specific trial right" of Handy or Nunn. *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933. Indeed, in *Buchanan v. Kentucky,* the Supreme Court made clear that trial before a death-qualified jury does not violate the constitutional rights of a noncapital defendant. 483 U.S. 402, 414–20, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). Neither did the death-qualification of the jury "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933. Implicit in the holding of *Buchanan* is the recognition that a death-qualified jury, no less than any other jury, is able to make a reliable judgment concerning guilt or innocence. To the extent appellants ask us to find that severance was required based only upon their allegation that death-qualified juries are more likely to convict than other juries, we may easily dispense with this argument as well. As the Supreme Court has explained, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 540, 113 S.Ct. 933. The district court acted within the appropriate bounds of its discretion in declining to sever Handy's and Nunn's trials from that of their codefendants.

## XXIII.

Next Handy contends that the district court erred in denying his motions for a new trial. Our review is for abuse of discretion unless the issue presented on *97 appeal is purely legal, in which event our review is *de novo. See United States v. Oruche,* 484 F.3d 590, 595 (D.C.Cir.2007).

Handy filed his first motion for a new trial following his conviction for participating in drug and RICO conspiracies and several other crimes involving narcotics, murder, obstruction of justice, and the use of firearms. *See* Jan. 9, 2003 AM Trial Tr. at 55–59. He argued there was insufficient evidence of his guilt and that the district court erred in making various evidentiary rulings and in instructing the jury. The district court denied the motion, finding that there was sufficient evidence for a reasonable jury to conclude that Handy was a "hitman" for the conspiracy, which he joined in the mid–1990s, and rejecting his other claims of error. *See United States v. Gray,* 292 F.Supp.2d 71, 90–91 (D.D.C.2003). Handy filed his second motion for a new trial during the pendency of the subsequent, separate trial of other alleged co-conspirators. This time he argued that the government had unconstitutionally withheld exculpatory and impeachment evidence, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. The district court denied the motion, ruling that "the evidence is not at all exculpatory or impeaching" and "the withholding of the evidence did not prejudice Handy." *United States v. Handy,* No. 00–157, at 3–4 (D.D.C. Mar. 4, 2005).

On appeal, Handy raises only some of the arguments he made in his motions; only the sufficiency of evidence claims relating to Handy's entry into the conspiracy and the murders of Richard Simmons and Demetrius Green, and the *Brady* claim relating to the pretrial statements of Cheryl Pinkard, are properly presented. The remaining arguments (including those relating to Scorpio Phillips) are forfeited because Handy has presented unsupported narratives lacking citation to the record and relevant authority. *See Bush v. Dist. of Columbia,* 595 F.3d 384, 388 (D.C.Cir.2010); *United States v. Hall,* 370 F.3d 1204, 1209 n. 4 (D.C.Cir.2004).

### A.

[55][56] Handy's arguments regarding the sufficiency of evidence are unpersuasive. Handy maintains there was a fatal variance between the superseding indictment and the government's proof at trial regarding his entry into the conspiracy because none of the cooperating co-conspirators testified that Handy had agreed with them or with Gray or Moore to join the charged conspiracy in the mid–1990s or thereafter. Such direct evidence of agreement is not required, however; the jury may infer conspiratorial agreement from the circumstances and the defendant's knowledge. *See*

*United States v. Childress,* 58 F.3d 693, 710 (D.C.Cir.1995). The cooperating co-conspirators provided ample testimony upon which the jury reasonably could infer Handy's knowledge of, and agreement to join, the drug conspiracy in the mid-1990s, and as early as 1994. *See, e.g.,* May 21, 2002 AM Trial Tr. at 33–34; July 9, 2002 AM Trial Tr. at 53–54. For example, Maurice Andrews testified that Handy was a participant in a drug operation located in the Northeast quadrant of Washington, D.C., which Moore and Gray actively managed in 1995–1996. *See* July 9, 2002 PM Trial Tr. at 82–83; *supra* Part VII. Further, the continuity of Handy's participation through 1998–1999, *see* July 10, 2002 PM Trial Tr. at 71, undermines his contention that the evidence demonstrated at best a buyer-seller relationship, rather than membership in the conspiracy. *See United States v. Thomas,* 114 F.3d 228, 241 (D.C.Cir.1997); *Childress,* 58 F.3d at 714.

***98** With respect to the Richard Simmons murder, the superseding indictment did not inconsistently charge Handy with committing the murder in July 1997 to gain entrance to the conspiratorial enterprise while also alleging that he joined the charged conspiracy in the mid-1990s. An indictment may charge alternative means of committing a crime. *See United States v. Coughlin,* 610 F.3d 89, 106–07 & n. 10 (D.C.Cir.2010). The superseding indictment, tracking the text of the RICO violent crimes statute, charged Handy with murdering Simmons for the alternative reasons listed in the statute—"as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value ... or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a); *see also* Count 60, Superseding Indict. at 134. The jury reasonably could have found from the evidence that Handy committed the murder in exchange for money, *see* Oct. 16, 2002 AM Trial Tr. at 130–34, or to maintain his status as an enforcer, *see* July 9, 2002 AM Trial Tr. at 54; *see also United States v. Carson,* 455 F.3d 336, 370 (D.C.Cir.2006).[FN23]

It also was well within reason for the jury to find that Demetrius Green's murder was a consequence of a territorial drug dispute associated with the charged conspiracy. Green was selling marijuana for James Penn, who controlled a stretch of houses at the top of a hill on Forrester Street Southwest, less than a quarter mile from the Southeast border. Handy, accompanied by another man identified in the superseding indictment as Taron Oliver, was also selling marijuana down the hill nearer to the Southeast quadrant of Washington, D.C., not too far from Green. Penn understood Handy and Oliver to be associated with Erskine Hartwell, *see* Sept. 24, 2002 PM Trial Tr. at 19, all of whom were members of Moore and Gray's drug operation in Northeast, *see* July 9, 2002 PM Trial Tr. at 82; Aug. 26, 2002 PM Trial Tr. at 113–16. Because Handy was, in Penn's words, "stepping on [Green's] toes" by taking sales away, Penn walked down the hill to "holler at [Handy]" to "slow down" and not make so many sales. Sept. 24, 2002 PM Trial Tr. at 23, 25–26. Following the verbal warning, which was essentially ignored, Penn retreated up the hill to get his guns. Penn testified that he took action because Handy "didn't have no business right there" and that Handy's selling marijuana on that section of Forrester Street was considered to be "some sort of violation." *Id.* at 26. By the time he retrieved his guns, Penn testified, "somebody had ran in and said they had shot [Green]." *Id.* at 28. Oscar Veal testified that Handy later claimed credit for murdering Green. *See* Aug. 27, 2002 PM Trial Tr. at 18. Eliminating rival competitors furthered the charged conspiracy by strengthening its presence in the D.C. drug trade. *See United States v. Walker,* 142 F.3d 103, 114 (2d Cir.1998).

### B.

More colorable is Handy's contention that the government failed to fulfill its obligations under *Brady,* 373 U.S. 83, 83 S.Ct. 1194, by not disclosing exculpatory and impeachment evidence from Cheryl Pinkard, an eyewitness to Richard Simmons's murder. The government's key evidence against Handy was an eyewitness account of the murder by the victim's mother, Margarita

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FN23. There is no claim that the jury lacked unanimity as to the ground for conviction. *See United States v. North,* 910 F.2d 843, 876 (D.C.Cir.1990).

Simmons. Ms. Simmons testified at trial that just prior to the murder she was standing by Richard as he *99 used a street pay phone. She watched as Handy ran down H Street, Northeast, from the 12th Street side, drew a gun, and fired at Richard. Ms. Simmons grabbed Richard briefly before he ran away from Handy toward the corner of 11th Street and H Street. Richard collapsed at that intersection and Handy, standing over him, shot Richard several times. *See* Aug. 19, 2002 AM Trial Tr. at 9–14. Handy contends that an FBI 302 interview report FN24 and the grand jury testimony of Pinkard, Richard's girlfriend, were exculpatory and subject to disclosure under *Brady* because they could have been used to impeach Ms. Simmons's testimony. *See Giglio v. United States,* 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In Handy's view, the report and grand jury testimony show that Pinkard did not see Ms. Simmons standing with Richard at the pay phone and therefore Ms. Simmons was not an eyewitness to the murder. The government responds that there was nothing exculpatory about the report or Pinkard's grand jury testimony, and because they were not "material" disclosure was not required under *Brady.*

> FN24. FBI 302 reports "are the formal typewritten interview reports prepared from the rough [interview] notes and recorded on Form FD–302." *United States v. Harrison,* 524 F.2d 421, 424 n. 2 (D.C.Cir.1975).

Under *Brady,* the government has a constitutional obligation to disclose "evidence favorable to an accused that is material to guilt or to punishment." *Cone v. Bell,* 556 U.S. 449, 129 S.Ct. 1769, 1772, 173 L.Ed.2d 701 (2009); *see also Oruche,* 484 F.3d at 596. To show a *Brady* violation, the defendant must establish that the evidence or information is favorable to him, either because it is exculpatory or impeaching; that the evidence was suppressed by the government, either willfully or inadvertently; and that he was prejudiced by the nondisclosure. *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also United States v. Bailey,* 622 F.3d 1, 8 (D.C.Cir.2010). Prejudice exists when the undisclosed evidence or information is "material," meaning "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *see also United States v. Pettiford,* 627 F.3d 1223, 1227 (D.C.Cir.2010). The district court's findings of fact, including determinations of credibility at trial and in post-trial proceedings, are reviewed for abuse of discretion, "[b]ut once the existence and content of undisclosed evidence has been established, the assessment of the materiality of evidence under *Brady* is a question of law," which this court reviews *de novo. Oruche,* 484 F.3d at 595.

[57] In making an initial determination about whether evidence or information is "material" and therefore subject to disclosure under *Brady, see United States v. Williams–Davis,* 90 F.3d 490, 514 (D.C.Cir.1996), the prosecutor is afforded "a degree of discretion" bound by "a corresponding burden" (inasmuch as the prosecution "alone can know what is undisclosed") of "gaug[ing] the likely net effect of all such evidence and mak[ing] disclosure when the point of 'reasonable probability' is reached," *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The Supreme Court has instructed that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs,* 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *see Kyles,* 514 U.S. at 439, 115 S.Ct. 1555. This is particularly true where the defendant brings the existence of what *100 he believes to be exculpatory or impeaching evidence or information to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material. *See Pennsylvania v. Ritchie,* 480 U.S. 39, 59, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

[58] Here, a prudent prosecutor would have disclosed at least Pinkard's grand jury testimony. Handy filed multiple requests for discovery, each of which sought *Brady* material related to the Simmons murder. Although Pinkard was not mentioned by name, Handy specifically sought, "[i]n reference to the Richard Simmons homicide, ... any and all documents." Def. Timothy Handy's First Mot. to Compel Disc. app. 2, at 5 (Sept. 13, 2001). In subsequent correspondence with

the government, Handy asked for "all documents pertaining to statements of non-testifying witnesses" and " *Brady* evidence and information regarding the murder of Mr. Richard Simmons," including "information that may impeach the witnesses against Mr. Handy." *Id.* app. 3, at 3. Although the Supreme Court has rejected the notion that *Brady* created a right of open file discovery for criminal defendants, *see Kyles,* 514 U.S. at 437, 115 S.Ct. 1555; *Ritchie,* 480 U.S. at 59, 107 S.Ct. 989, given Handy's repeated requests and the centrality of eyewitness testimony to the government's case against him concerning the Simmons murder, *cf. Kyles,* 514 U.S. at 441–44, 115 S.Ct. 1555, the prosecutor should have recognized that Pinkard's eyewitness account raised at the least a "doubtful question [ ]" favoring disclosure under *Brady, see Agurs,* 427 U.S. at 108, 96 S.Ct. 2392.

The government's suggestion on appeal that Handy's *Brady* claim is foreclosed by his knowledge at the time of trial is not well taken. It noted that Handy knew Pinkard had witnessed the shooting and cross-examined Ms. Simmons without Pinkard's grand jury testimony. Although "the right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the ... information chooses not to present such information to the jury," *United States v. Iverson,* 648 F.2d 737, 739 (D.C.Cir.1981), the specificity and scope of the defendant's knowledge is the key consideration. In *United States v. Smith,* 77 F.3d 511, 515–16 (D.C.Cir.1996), the court held that although aspects of a witness's plea agreement were known to the defendant, the prosecutor's nondisclosure of other elements of the plea agreement unknown to the defendant violated *Brady* because the information was material to the defendant's ability to impeach the witness. A review of the trial transcript excerpts provided by the parties indicates that Handy knew only that Pinkard was at the murder scene and had accompanied Ms. Simmons to the hospital after the shooting; his cross-examination of Ms. Simmons was limited to whether she spoke to Pinkard at the hospital, Aug. 19, 2002 AM Trial Tr. at 60–61, and when she first saw Pinkard at the scene, Aug. 19, 2002 PM Trial Tr. at 20–21. Absent the government's disclosure of Pinkard's grand jury testimony, Handy lacked a reason to delve further into Ms. Simmons's and Pinkard's allegedly different accounts of the murder. Under *Brady* it was incumbent upon the prosecutor to disclose Pinkard's grand jury testimony to Handy for his use at trial. *See Giglio,* 405 U.S. at 154, 92 S.Ct. 763; *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375; *United States v. Celis,* 608 F.3d 818, 835 (D.C.Cir.2010).

Nonetheless, Handy fails to show that the violation of his due process right to disclosure under *Brady* was "material." *See Strickler,* 527 U.S. at 281–82, 119 S.Ct. 1936; ***101***Bagley,* 473 U.S. at 682, 105 S.Ct. 3375. Handy places significant weight on Pinkard's testimony of December 11, 2003, during the subsequent trial of other coconspirators. *See* Dec. 11, 2003 PM Group 2A Trial Tr. at 28–30, 50–51, 82–83, 86, 92, 95–98. In his view, her testimony that Ms. Simmons was *not* standing by Richard's side when he was talking on the pay phone before being shot is "illustrative" of the fact that Pinkard witnessed the murder but Ms. Simmons did not. This proves, Handy maintains, that the government knew Pinkard was a witness capable of impeaching Ms. Simmons's credibility as an eyewitness to Richard's murder, and thus her pretrial statements to law enforcement and grand jury testimony should have been disclosed. But Handy overstates the force of any likely impeachment.

First, Pinkard's subsequent trial testimony is not as impeaching as Handy suggests. She acknowledged up to a minute gap between observing Richard walk out to the pay phone and looking up to see him run down the street. *See id.* at 95. Ms. Simmons might easily have appeared at Richard's side during this time.

Second, before the grand jury Pinkard recounted that, prior to the murder, she was talking to her father on a pay phone across the street from Richard's sports store. *See* Oct. 27, 2000 Grand Jury Tr. at 23–24. She observed Richard exit the store to use the pay phone and signaled that they were running late by tapping her wrist. She then testified that "less than five minutes" later she "heard something go boom" and looked up to see Richard running down the street. *See id.* at 24. She then crossed the street to where Richard had collapsed, noting that Ms. Simmons "was, like, already right there.

I don't know where she had come from." *Id.* at 26. Absent from the grand jury transcript is any assertion by Pinkard that Ms. Simmons was not standing next to Richard when he was shot while standing at the pay phone. To the contrary, the following exchange occurred:

> Q: And do you remember [Ms. Simmons] being outside at the time [of the shooting]?
>
> A: I think she was, but I'm not sure.... I think she was, because I think—I'm not sure, but I think when [Richard] came out to use the phone, he had locked the door. But I'm not sure. I don't know where she popped up from.

*Id.* at 41. Thus, Pinkard's subsequent trial testimony is inconsistent with, rather than illustrative of, her grand jury testimony on the key point. In another respect, her grand jury testimony shares the same flaw as her subsequent trial testimony. The five-minute gap between Pinkard observing Richard at the pay phone and hearing the first gunshot was a relatively lengthy period during which Ms. Simmons could have emerged from the store and joined Richard on the sidewalk without Pinkard's knowledge. Had the government disclosed the grand jury testimony to Handy prior to his trial, there is not a reasonable probability that this information could have been used to impeach Ms. Simmons's claim to be an eyewitness to Richard's murder such that it would have changed the outcome of the proceeding.

Third, even assuming a prudent prosecutor would have disclosed the FBI 302 interview report, it contains no representation one way or the other as to whether Ms. Simmons was present at the time of Richard's murder. The only reference to Ms. Simmons is this sentence: "PINKARD stated that she and [Richard] SIMMONS has just left their house and were en route to the movies when SIMMONS' mother paged him." *See* Def. Handy's Second Mot. for New Trial Exhibit 18, at 1 *102 (Dec. 18, 2004). It is far from apparent how Handy could have used information from the FBI 302 interview report to impeach Ms. Simmons's credibility as an eyewitness and, as such, we are confident its use, even with disclosure of Pinkard's grand jury testimony, would not have changed the outcome of the proceedings.

## XXIV.

We reject all claims raised by appellants that we have not discussed individually. We have fully considered all such claims and find they do not warrant separate discussion or relief.

* * *

For the foregoing reasons, we affirm all of appellants' convictions except Count 32, which we vacate; Counts 4 and 5, which we remand to the district court for an evidentiary hearing and to address Smith's ineffective assistance of counsel claim; and Counts 126–138, which we remand to the district court for consideration in light of *Bullcoming v. New Mexico*, —U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

ROGERS, Circuit Judge, concurring in part in Part I of the per curiam opinion:

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court announced a three-part analysis to identify whether racial discrimination had motivated peremptory challenges in jury selection. First, the defendant must establish a *prima facie* case by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose," with respect to either a particular peremptory strike or a pattern of strikes. *Id.* at 93–94, 106 S.Ct. 1712. Second, the prosecutor must "come forward with a neutral explanation for challenging [the] jurors," not based on racial or other impermissible classifications. *Id.* at 97, 106 S.Ct. 1712. Third, the trial judge then "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712; *see also Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005); *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). This court has seldom addressed a *Batson* challenge, and on the rare occasion it has, our analysis of step three was limited.[FN1] A few observations beyond those stated by the court today are in order.

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[FN1] *See United States v. Watson*, 483 F.3d

828 (D.C.Cir.2007); *United States v. Spriggs,* 102 F.3d 1245, 1254–55 (D.C.Cir.1996); *United States v. White,* 899 F.2d 52 (Table), 1990 WL 42213 (D.C.Cir. Apr. 4, 1990). By contrast, the *Batson* issue has been fulsomely explored on multiple occasions by the District of Columbia Court of Appeals where the United States Attorney is also responsible for prosecutions involving felonies and major misdemeanors under the D.C. Code. *See, e.g., Smith v. United States,* 966 A.2d 367, 369–88 (D.C.2009).

Justice Marshall, concurring in *Batson,* which he characterized as a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," had grave doubts that the goal of "end[ing] the racial discrimination that peremptories inject into the jury-selection process" could be accomplished without "eliminating peremptory challenges entirely." *Id.* at 102–03, 106 S.Ct. 1712 (Marshall, J., concurring). His doubts, he explained, arose because defendants are only able to attack discriminatory use of peremptory challenges where the challenges are so flagrant as to establish a *prima facie* case, and because trial judges face the difficult burden of assessing a prosecutor's motives. *See id.* at 105–06, 106 S.Ct. 1712. As to the latter, Justice Marshall asked, citing examples from the case law:

> ***103** How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as [the] defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"?

*Id.* at 106, 106 S.Ct. 1712 (internal citations omitted). Justice Marshall foresaw that "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Id.*

Justice Powell, writing for the Court, responded:

> While we respect the views expressed in Justice Marshall's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them.... We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

*Id.* at 99 n. 22, 106 S.Ct. 1712 (majority opinion).

The Supreme Court, therefore, expected that trial judges, in fulfilling their duty, would effectively ensure that the justice system did not facilitate the denial of equal protection by remaining vigilant and attentive to the risk that overzealous prosecutors may inject racial strategies into jury selection in the effort to obtain a conviction. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145, 155–56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Court expected the trial judge would undertake " 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Batson,* 476 U.S. at 93, 106 S.Ct. 1712 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

The Supreme Court has repeatedly emphasized the significance of the trial judge's role at step three. In *Johnson,* the Court explained:

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

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545 U.S. at 171, 125 S.Ct. 2410 (quoting *Purkett,* 514 U.S. at 768, 115 S.Ct. 1769). Indeed, the defendant need not show that it is more likely than not that the peremptory challenges, if unexplained, were based on impermissible group bias, *id.* at 168, 173, 115 S.Ct. 1769, and the case proceeds to step three even if the prosecution "produces only a frivolous or utterly nonsensical justification for its strike," *id.* at 171, 115 S.Ct. 1769. As explained in *Snyder v. Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008):

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the ***104** attorney who exercises the challenge." In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor ( *e.g.,* nervousness, inattention), making the trial court's first-hand observations of even greater importance.

*Id.* at 477, 128 S.Ct. 1203 (alteration in original) (internal citations omitted). A reviewing court, in turn, "ordinarily should give [the trial judge's] findings" based on an evaluation of demeanor and credibility "great deference." *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. 1712.

"The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson,* 545 U.S. at 172, 125 S.Ct. 2410. "The three-step process ... simultaneously serves the public purposes *Batson* is designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Id.* at 172–73, 125 S.Ct. 2410 (citation and internal quotation marks omitted). The rights *Batson* vindicates, however, are not confined to the rights possessed by the defendant on trial, but extend "to those citizens who desire to participate 'in the administration of the law, as jurors,' " *id.* at 172, 125 S.Ct. 2410 (quoting *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1880)), as well as to "the overriding interest in eradicating discrimination from our civic institutions [that] suffers whenever an individual is excluded from making a significant contribution to governance on account of his race" or other suspect characteristic, *id.* The "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," for "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson,* 476 U.S. at 87, 106 S.Ct. 1712; *see also Powers v. Ohio,* 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Long before *Batson,* the Supreme Court had observed: "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas,* 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940) (footnote omitted). The role of the trial judge, in either dispelling any notion that the proceedings have been affected by prejudice or repudiating such prejudice when it occurs, remains paramount, even today in the District of Columbia.[FN2] This important function of the trial judge is fully consistent with the motivations underlying *Batson,* 476 U.S. at 87, 106 S.Ct. 1712, and not served by conclusory or dismissive rulings of the district court.

FN2. A five-part study of jury service in the District of Columbia by the National Center for State Courts identified that among the reasons the general public avoids jury service is perceived unfairness and biases in the justice system. *See* Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?,* 20 JUST. SYS. J.. 203, 212 (1999). Various recommendations have been developed to address this perception, including the elimination or curtailment of peremptory strikes that in "the experience of most trial judges ... at a minimum, give[ ] the appearance that prospective jurors are being peremptorily stricken on grounds of race, gender or both." COUNCIL FOR COURT EXCELLENCE: DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN

WASHINGTON, D.C. 26 (1998).

Since *Batson,* when the Supreme Court has encountered cases where the trial judge failed to fulfill his or her duty, it has not hesitated to examine the *voir dire* ***105** proceedings in painstaking detail, inasmuch as a single instance of racial discrimination in jury selection requires reversal of a conviction, *see id.* at 95–96, 106 S.Ct. 1712. An example of such detailed review is *Snyder,* where the trial judge failed to make a finding on the record based on the evidence presented regarding the prosecutor's two explanations for striking an African American juror, and consequently the deference inherent in clear error review was replaced by what was tantamount to *de novo* review. *See* 552 U.S. at 479, 482, 128 S.Ct. 1203.[FN3] This is reflected in the practice of circuit courts of appeals when reviewing contentions that would normally be subject to clear error review but for the fact that the district court made no findings of fact. *See, e.g., United States v. Microsoft Corp.,* 147 F.3d 935, 945 n. 7 (D.C.Cir.1998); *see also United States v. Smith,* 640 F.3d 580, 596 (4th Cir.2011); *United States v. McMath,* 559 F.3d 657, 663 (7th Cir.2009); *Dennis v. Mitchell,* 354 F.3d 511, 517 (6th Cir.2003); *Armienti v. United States,* 234 F.3d 820, 822 (2d Cir.2000); *United States v. Vega,* 221 F.3d 789, 795 (5th Cir.2000). As to the first of two explanations proffered, the Supreme Court reasoned in *Snyder* that, in the absence of a specific finding, it could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.* As to the second proffered explanation, the Supreme Court concluded, quoting at length the transcription of the trial court proceedings, that the prosecutor's "explanation given for the strike ... is by itself unconvincing," *id.* at 478, 128 S.Ct. 1203, and that "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting [time] obligations that appear to have been at least as serious as [those of the struck black juror]," *id.* at 483, 128 S.Ct. 1203; *cf. Miller–El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (on habeas petition). Additionally, when confronted on habeas review with a state prosecutorial policy to strike African American members of the venire that resulted in a pattern of such strikes in *Miller–El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196, the Supreme Court held, upon a searching record review, that the trial judge's factual findings as to the nonpretextual nature of the state's race-neutral explanations were wrong by clear and convincing evidence, *id.* at 266, 125 S.Ct. 2317. In a concurring opinion one Justice acknowledged Justice Marshall's concerns and the defects intrinsic to the *Batson* analysis, *see id.* at 266–67, 125 S.Ct. 2317 (Breyer, J., concurring), and concluded that "a peremptory jury-selection system that permits or encourages the use of stereotypes work[s] at cross-purposes" with "the law's antidiscrimination command," *id.* at 271–72, 125 S.Ct. 2317.

The Supreme Court's post- *Batson* precedent has forewarned lower courts that *Batson* objections are not to be lightly dismissed. A one-size-fits-all approach by the trial judge—summarily stating that the prosecutor's explanations are credible—risks reversal of a conviction on appeal. The Supreme Court has held that the prosecutor's response to an allegation of racially motivated peremptory strikes "must [be] a 'clear and reasonably specific' explanation of his 'legitimate reasons' for ***106** exercising the challenges." *Batson,* 476 U.S. at 98 n. 20, 106 S.Ct. 1712 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 258, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). It would be remarkable, to say the least, to conclude that the trial judge's evaluation at step three of the *Batson* analysis need not also be clear and reasonably specific.

Even though "these determinations of credibility and demeanor lie peculiarly within a trial judge's

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[FN3] FN3. In adopting a clear error standard of review, the Supreme Court in *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203, cited the plurality opinion in *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), in which concern was expressed that a more searching review of findings made in a state trial court would be incompatible with concepts of federalism. *Id.* at 369, 111 S.Ct. 1859. No federalism concern exists with respect this court's review of the district court's *Batson* ruling.

province and ... in the absence of exceptional circumstances, [the Supreme Court] would defer to [the trial court]," *Snyder,* 552 U.S. at 477, 128 S.Ct. 1203 (second alteration in original) (internal citations and quotation marks omitted), no deference is due to the trial judge's *Batson* ruling based on the evidence before it unless it explains on the record why it credited the prosecutor's race-neutral explanation and rejected the defendant's arguments that an individual strike was racially motivated or that a series of strikes demonstrated a pattern of racially motivated strikes. *See id.* at 479, 128 S.Ct. 1203; *cf. Miller–El v. Cockrell,* 537 U.S. at 341–43, 123 S.Ct. 1029. After all, in *Batson,* and before and after, the Supreme Court emphasized that purposeful racial discrimination in jury selection, resulting in the denial of equal protection, "harms not only the accused whose life or liberty they are summoned to try," but "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," "undermin[ing] public confidence in the fairness of our system of justice." *Batson,* 476 U.S. at 87, 106 S.Ct. 1712; *see also Miller–El v. Dretke,* 545 U.S. at 237–38, 125 S.Ct. 2317; *Strauder v. West Virginia,* 100 U.S. 303, 309, 25 L.Ed. 664 (1880). The Court's precedent contemplates no less than that trial judges will give full consideration to the evidence presented of racial bias, *see Snyder,* 552 U.S. at 478, 128 S.Ct. 1203, by, for example, comparing the prosecutor's behavior in striking, not striking, and questioning like jurors of different races, looking for patterns or statistical disparities, and examining whether any policy or practice of the relevant prosecutor's office implicates *Batson* concerns, *see, e.g., Miller–El v. Cockrell,* 537 U.S. at 331–35, 123 S.Ct. 1029.

Because the district court's findings in the instant case were conclusory, without sufficient explanation to permit meaningful appellate review, the usual deferential review falls away and the question is whether this court, upon review of the record, finds by a preponderance of the evidence that the defendant has established purposeful discrimination by the prosecutor. Although not characterized by the Supreme Court as *de novo* review, the analysis of the court today, sifting struck-juror by struck-juror through the transcription of the *Batson* proceedings, much as the Supreme Court did for a single struck juror in *Snyder,* reflects this reality. *See* Op. at 42–44. The Supreme Court contemplated, inasmuch as a single *Batson* violation requires reversal of a conviction, *see, e.g., Snyder,* 552 U.S. at 478, 128 S.Ct. 1203, that the trial judge would provide a record that reveals on an objection-by-objection basis how, upon considering "all of the circumstances that bear upon the issue of racial animosity," *id.* (citing *Miller–El v. Dretke,* 545 U.S. at 239, 125 S.Ct. 2317), the defense objections to the prosecutor's strike explanations were resolved. Otherwise, the Supreme Court's expectation of the constitutional protection institutionalized in *Batson,* as well as the expectations for the prosecutor and trial judge described in Justice Powell's response to Justice Marshall's concerns, will have proven illusory. This explains the painstaking review of the trial court record that the Supreme Court has undertaken, for example, in ***107***Snyder,* 552 U.S. at 478–84, 128 S.Ct. 1203, and *Miller–El v. Dretke,* 545 U.S. at 240–66, 125 S.Ct. 2317, to underscore that the third step of *Batson* cannot become a matter of rote or one-size-fits-all analysis.

On the merits, appellants' *Batson* challenges do not entitle them to reversal of their convictions, even upon *de novo* review of the record.[FN4] A single example suffices. Defense counsel challenged the striking of "Juror 5773" on the ground that the prosecutor was applying a double standard in peremptorily striking "Juror 5773," an African American male, but not "Juror 6487," a Caucasian male. Both were opposed to the death penalty. The prosecutor in his *Batson* step two response stated that "Juror 5773" gave equivocal answers about the death penalty and his religious views thereon. Appellants maintain that the record showed that the main concern of "Juror 5773" was not religious but a concern of condemning the wrong man to death. During the *Batson* colloquy, defense counsel had argued that "Juror 5773" had "some pro-prosecution instincts regarding the death penalty, but [was] generally thoughtful," and disagreed that "Juror 5773" "would oppose the death penalty on religious grounds." Instead of dealing with this factual disagreement and making reasonably specific findings on the record to which this court, as appropriate, could defer, the district court ruled as to all de-

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fense challenges that it credited the prosecutor's explanation of non-racial reasons for all of the peremptory strikes of African American members of the venire.

FN4. Appellants do not pursue on appeal their *Batson* challenges based on gender. *See* Appellee's Br. at 28 n. 21.

A review of the transcription of the *Batson* proceedings supports the plausibility of the prosecutor's race-neutral explanations for its peremptory challenge to "Juror 5773," even upon *de novo* review. The relevant answers provided by the two veniremen in their questionnaires reveals a salient difference. The Caucasian venireman followed his expression of opposition to the death penalty with the statement: "I would try to abide by the Court's instruction, not my personal belief." By contrast, the African American venireman indicated his concerns about the death penalty would cause him to have concerns about being fair, explaining he had "so many questions about the death penalty and [his] belief in it." Cognizant that the burden of persuasion to prove the existence of purposeful discrimination in peremptory strikes ultimately rests with the defendant, *Johnson,* 545 U.S. at 170–71, 125 S.Ct. 2410, it is apparent that the prosecutor's proffered explanation that the difference in the veniremen's answers and not a difference in their race motivated their disparate treatment. For essentially the reasons stated by the court with respect to the remaining strikes, *see* Op. at 42–44, each likewise survives *de novo* review of the record.

In view of the equal protection concerns identified earlier, a final observation bears mentioning. As a matter of public record, the jury venire in the District of Columbia in 2011 is unlikely, as it was in 2002 when jury selection began in the instant case, to have a majority of African American venire members, no matter how many are peremptorily struck by the prosecutor. The U.S. Census of 2000 showed that African Americans were 60.0% of the District of Columbia's population, with Caucasians making up 30.8%; Hispanics or Latinos were 7.9%. The venire in the instant case was approximately three-quarters African American, and the twelve-member jury that was selected for trial was composed of nine African American jurors and three Caucasian jurors. The demographics have *108 changed. The U.S. Census of 2010 showed that African Americans comprise 50.7% of the District of Columbia's population to Caucasian's 38.5%, with Hispanics or Latinos comprising 9.1%. Likely then, [FN5] in a trial of an African American defendant, a prosecutor will no longer be able to pose the rhetorical question in the government's brief, contrary to the purposes of *Batson* and its progeny: Why, as a matter of trial tactics, would the government discriminate in exercising peremptory challenges when the venire and the petit jury would be overwhelming African American? Appellee's Br. at 68; *see also* May 7, 2002 PM Trial Tr. at 25, 32. Courts in the District of Columbia likewise will likely be unable, as a factual matter, to base acceptance of a prosecutor's race-neutral explanations for strikes at *Batson*'s third step in part on the generality, as in 2002, that a predominantly African American jury will nonetheless be seated. To the extent distrust of the justice system among minorities and women persists, based in part on fear that they will be discriminated against during jury service, *see supra* note 2, accepting the prosecution's approach, as reflected in the rhetorical question, suggests in view of the changing demographics in the District of Columbia at least two concerns: First, a growing risk that an overzealous prosecutor could be successful in turning a jury toward conviction based on racially motivated or otherwise discriminatory peremptory strikes. Second, such activity by prosecutors would result in greater mistrust of the justice system and reduced participation in jury service by the affected populations.

FN5. Individuals are called for jury service in the District of Columbia based on lists of registered voters, licensed drivers, and those having nondriver identification cards from the D.C. Department of Motor Vehicles. *See* Seltzer, *supra* note 2, at 204.

C.A.D.C.,2011.
U.S. v. Moore
651 F.3d 30, 397 U.S.App.D.C. 148

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# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 05-3050** **September Term, 2010**
FILED ON: JULY 29, 2011

UNITED STATES OF AMERICA,
APPELLEE

V.

RODNEY L. MOORE, ALSO KNOWN AS RASOO,
APPELLANT

Consolidated with 05-3051, 05-3052, 05-3053, 05-3054, 05-3064

Appeals from the United States District Court
for the District of Columbia
(No. 1:00-cr-00157)

Before: SENTELLE, *Chief Judge*, ROGERS and KAVANAUGH, *Circuit Judges*

## JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed in part, vacated in part, and the cases are remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Date: July 29, 2011

Opinion Per Curiam
Opinion concurring in part in Part I filed by Circuit Judge Rogers.

# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 05-3050**

**September Term 2011**

**00cr00157-02**

**Filed On**: November 30, 2011

United States of America,

Appellee

v.

Rodney L. Moore, also known as Rasoo,

Appellant

Consolidated with 05-3051, 05-3052, 05-3053, 05-3054, 05-3064

**BEFORE:** Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

## ORDER

Upon consideration of appellants' petition for panel rehearing filed on September 23, 2011, and the response thereto, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT**:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 05-3050** **September Term 2011**

**00cr00157-02**

**Filed On:** November 30, 2011

United States of America,

Appellee

v.

Rodney L. Moore, also known as Rasoo,

Appellant

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Consolidated with 05-3051, 05-3052, 05-3053, 05-3054, 05-3064

**BEFORE:** Sentelle, Chief Judge, and Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

## ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

# OPPOSITION BRIEF

No. 11-8976

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IN THE SUPREME COURT OF THE UNITED STATES

CALVIN SMITH AND JOHN RAYNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

# QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review to the district court's rejection of petitioners' claim under Batson v. Kentucky, 476 U.S. 79 (1986).

2. Whether the district court erred in instructing the jury that petitioner Smith bore the burden of proving by a preponderance of the evidence the affirmative defense of withdrawal from the conspiracies charged in the indictment.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 11-8976

CALVIN SMITH AND JOHN RAYNOR, PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-72) is reported at 651 F.3d 30.

## JURISDICTION

The judgment of the court of appeals was entered on July 29, 2011. A petition for rehearing was denied on November 30, 2011 (Pet. App. 74-75). The petition for a writ of certiorari was filed on February 27, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of conspiracy to distribute and possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; and multiple counts (six for petitioner Raynor and three for petitioner Smith) of murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (Michie Supp. 1995). Petitioner Raynor was also convicted on five counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); tampering with a witness or informant by killing, in violation of 18 U.S.C. 1512(a)(1)(C); possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of illegal use of a firearm, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (C)(i); and three counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). Raynor Judgment 1. Petitioner Smith was additionally convicted of murder in connection with a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Smith Judgment 1. Petitioners were each sentenced to a life term of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed in part petitioner Smith's convictions, but remanded for further proceedings with respect to his claim that his counsel provided ineffective assistance in his defense against two of the murder counts. The court affirmed in part petitioner Raynor's convictions, but remanded the substantive drug charge for further consideration in light of Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011). Pet. App. 1-72.

1. Petitioners were members of a drug organization (led by co-defendants Rodney Moore and Kevin Gray) that distributed heroin, cocaine, crack cocaine, and marijuana in various areas throughout Washington, D.C., from the late 1980s through 2000. Gov't C.A. Br. 7-15; Pet. App. 15; 11/17/1999 Superseding Indictment 3. Petitioner Raynor was Moore's "right-hand man" through much of the conspiracy. Gov't C.A. Br. 174. Petitioners and other members of the organization committed numerous acts of violence, including multiple murders, to further the goals of the conspiracy. Id. at 8-11. Both petitioners were convicted of substantive murder offenses and of engaging in a conspiracy that included acts of murder to achieve its goals. Id. at 8-9, 262-266, 296-304; Pet. App. 50-53.

Starting in 1994, petitioner Smith was incarcerated after being arrested for and pleading guilty to shooting a man named Maurice Willis on December 23, 1993. Gov't C.A. Br. 9-10 n.8, 96 & n.66, 250 & n.150, 261, 294; see Pets. C.A. Br. 295. Petitioner Smith confessed to a co-conspirator that he had agreed to the plea so that Gray would be charged only with a misdemeanor offense.

Gov't C.A. Br. 294. Gray rewarded petitioner Smith by supplying Smith with marijuana while Smith was in prison and by sending money to Smith and his wife. Id. at 294-295. During his time in prison, petitioner Smith looked out for the interests of the conspiracy by providing information to Gray about a suspected cooperator and by threatening a cooperating witness. Id. at 295.

2. On November 17, 2000, the grand jury returned a 158-count superseding indictment charging petitioners, Gray, Moore, and 13 others with drug conspiracy, RICO conspiracy, murder, and other related charges, in violation of federal and District of Columbia law. Petitioners were tried before a jury with four co-defendants. Pet. App. 15-16.

a. Before jury selection, each potential juror completed a lengthy questionnaire and was individually interviewed at the bench. Gov't C.A. Br. 33. Because the government was seeking the death penalty for co-defendants Moore and Gray, see Gov't C.A. Br. 75, 81, questioning of potential jurors included inquiry into their views on the death penalty. See Pet. App. 17-19; Gov't C.A. Br. 34-67. The 90-person pool of potential jurors contained 68 African-Americans. Pet. App. 17. The government used 34 of its 37 peremptory challenges and seven of its eight alternate-juror peremptory challenges to strike African-American venirepersons. 5/7/02 Tr. 32, 45-46.

Petitioners objected to the government's use of peremptory challenges, claiming that the government struck potential jurors because they were African-American, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Pet. App. 16. The district court found that petitioners had established a prima facie case of racial discrimination and required the government to explain the basis for each of its strikes of an African-American venireperson. Ibid. Petitioners challenged the government's proffered justifications with respect to 22 potential jurors and the government supplemented its explanations as to those potential jurors. Gov't C.A. Br. 31; 5/7/02 Tr. 33-82. The hearing on the Batson challenges lasted several hours, during which time the district court consulted its notes, corrected and questioned counsel, and clarified the record about the racial composition of the venire and the pattern of the government's strikes. Pet. App. 16; 5/7/02 Tr. 19-25, 31-32, 45-46.

After considering the arguments from both sides, the district court stated:

> Assuming on the facts before me today that there is a prima facie case as to a race challenge under Bat[]son, I have heard the government's articulated reasons. I find they should be credited, and they are credited despite the reasons set forth by counsel for [petitioners] why I should not believe that race was a factor in the government's exercise of their peremptory strikes. I find that race was not a factor and the government had a basis other than race for the exercise of each peremptory strike.

5/7/02 Tr. 82-83. The court therefore denied petitioners' Batson objections. Id. at 83. Petitioners did not request more detailed findings. The 12-member jury ultimately included nine African-Americans. Pet. App. 17.

b. The district court instructed the jury that, as an element of proving that petitioners had engaged in a conspiracy, the government was required to prove that the charged conspiracy existed for some time between 1988 and November 2000 "and continuing within the period of the applicable statute of limitations." Gov't C.A. Br. 282. The court also instructed the jurors: "If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before . . . May 5th, 2000 for [petitioner Smith] . . . you must find [petitioner Smith] not guilty of" the conspiracy count. Pet. App. 57.[1] During deliberations, the jury returned a note asking, "[i]f we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" Ibid. Over petitioners' objection, the court responded that "[t]he relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy." Gov't C.A. Br. 283-284. The court then explained the requirements for asserting a withdrawal defense:

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[1] The court's instruction used the date of the first superseding indictment, which was filed on May 5, 2000, but did not charge petitioner Smith. Petitioner Smith was charged on November 17, 2000, in the second superseding indictment. Gov't C.A. Br. 163-164. Petitioner Smith does not challenge that misstatement and has not identified any prejudice resulting therefrom.

> Once the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing.
>
> In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence[,] regardless of who may have produced them.
>
> If the evidence appears to be equally balanced or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant's coconspirators in a manner reasonably calculated to reach those coconspirators. Withdrawal must be unequivocal.

Id. at 284-285 (brackets in original); see Pet. App. 57.

The jury convicted petitioners of conspiracy to distribute and possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(A); RICO conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; and multiple counts (six for petitioner Raynor and three for petitioner Smith) of murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (Michie

Supp. 1995). Petitioner Raynor was also convicted on five counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); tampering with a witness or informant by killing, in violation of 18 U.S.C. 1512(a)(1)(C); possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of illegal use of a firearm, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (C)(i); and three counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). And petitioner Smith was convicted of murder in connection with a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Raynor Judgment 1; Smith Judgment 1. Petitioners were each sentenced to a life term of imprisonment, to be followed by five years of supervised release. Raynor Judgment 3-4; Smith Judgment 2-3.

3. a. On appeal, petitioners asserted numerous challenges to their convictions and sentences. As relevant here, petitioners argued that the district court's "lack of findings" on their Batson objections "require[d] reversal." Pets. C.A. Br. 49. The court of appeals rejected that claim. Pet. App. 16-19. The court noted that "[t]he district court required three rounds of argument on each strike of an African-American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument." Id. at 17. The court of appeals

observed that, "[t]hroughout the hearing, the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel" and acknowledged that the district court's conclusions were "based on the [parties'] arguments and [the court's] personal observation of the prosecutors and of the prospective jurors." Ibid.

Noting that petitioners had not cited any "controlling precedent requiring a trial court to render its decision in a strike-by-strike format," and commenting on "the obvious thoroughness of the district court's application of Batson's third step," the court of appeals "conclude[d] that the lack of strike-specific findings" did not "create[] the sort of 'exceptional circumstances' that would overcome [the court's] deference to the trial court." Pet. App. 17 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). The court of appeals also observed that the final racial composition of the jury, which reflected the racial make-up of the venire, undermined the merits of petitioners' claim. Pet. App. 17. Nevertheless, acknowledging that "[t]he dismissal of even a single prospective juror on the basis of race violates equal protection principles," ibid., the court of appeals reviewed each of the 11 strikes challenged on appeal and concluded that the district court did not clearly err (or plainly err in the case of the unpreserved challenges) in finding that the reasons for the strikes were race-neutral, id. at 17-19.

b. The court of appeals also rejected petitioner Smith's contention that the district court erred by instructing the jury that he, rather than the government, bore the burden of proving that he withdrew from the conspiracy. See Pet. App. 57. The court acknowledged that the courts of appeals are divided on that issue. Ibid. The court noted, however, that it did "not write on a blank slate" because the D.C. Circuit had previously held, albeit in the sentencing context, "that the defendant, not the government, 'has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement.'" Id. at 57-58 (quoting United States v. Thomas, 114 F.3d 228, 268 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997)). The court of appeals therefore held that "the district court correctly instructed the jury that [petitioner Smith] bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period." Id. at 58.

c. Judge Rogers filed a separate opinion, concurring in part in the portion of the court's per curiam opinion addressing petitioners' Batson challenges. Pet. App. 67-72. Because she viewed the district court's findings as "conclusory, without sufficient explanation to permit meaningful appellate review," she would not have applied "the usual deferential review," but would instead have asked "whether [the court of appeals], upon review of the record, finds by a preponderance of the evidence that [petitioners] ha[ve] established purposeful discrimination by the prosecutor." Id. at 71. Even applying a de novo standard of review to the record in this case, however, Judge Rogers concluded that petitioners' "Batson challenges do not entitle them to reversal of their convictions." Ibid. Judge Rogers set out her view of why the government's strike of prospective juror 5773 was not discriminatory and explained that, "[f]or essentially the same reasons stated by [the majority of] the court with respect to the remaining strikes, each likewise survives de novo review of the record." Id. at 72 (internal citation omitted).

## ARGUMENT

Petitioners challenge (Pet. 3-11) the court of appeals' review of whether each of the challenged peremptory strikes of potential jurors was discriminatory. The court of appeals' determination that none was does not warrant review because the court's decision was correct and does not conflict with any decision of this Court or another court of appeals. Petitioner Smith also argues (Pet. 11-15) that the district court erred in refusing to instruct the jury that the government bears the burden of proving beyond a reasonable doubt that he did not withdraw from the charged conspiracies outside the limitations period. Although the courts of appeals are divided on the proper allocation of proof when a defendant asserts a withdrawal defense, further review is not warranted in this case because any error in the district court's instruction was harmless and petitioner would therefore not benefit from the resolution of the question presented.

1. Petitioners urge this Court to grant their petition for a writ of certiorari in order both to "resolve" whether a district court's rejection of a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), should be reviewed under a clear-error or de novo standard and to "make clear that where a prosecutor proffers multiple justifications for striking a particular juror and the trial judge does not make specific findings as to each reason, the reviewing court must -- whatever the standard of review -- review each reason." Pet. 7. Review of those issues is not warranted because the court of appeals correctly resolved them and because resolution of those questions in petitioners' favor would not result in a different outcome in this case.

a. Batson establishes a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising peremptory challenges. 476 U.S. at 96-98. First, the defendant must establish a prima facie case of discrimination by establishing that the "relevant circumstances raise an inference" of racial discrimination. Id. at 96-97; Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion). Second, if a defendant makes such a showing, the government must come forward with a race-neutral explanation for each challenged strike. Batson, 476 U.S. at 97-98; Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). Third, if the government provides a race-neutral explanation for each strike, "the trial court must * * * decide * * * whether the opponent of the strike has proved purposeful racial discrimination." Purkett, 514 U.S. at 767; Batson, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768.

The "ultimate question of discriminatory intent" is a "pure issue of fact," Hernandez, 500 U.S. at 364 (plurality opinion), that turns on "whether the trial court finds the prosecutor's race-neutral explanations to be credible," Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (Miller-El I). The court's assessment of "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Id. at 339; Hernandez, 500 U.S. at 365 ("There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge"). Because the trial court is in the best position to assess credibility, its determination of that issue receives "great deference on appeal" and is reviewed only for clear error. Hernandez, 500 U.S. at 364 (plurality opinion). Relying on Judge Rogers' concurrence, petitioners argue (Pet. 3-11) that the court of appeals erred in reviewing the district court's conclusion that each of the juror strikes at issue was not racially motivated under a clear-error standard rather than reviewing each determination de novo.[2]

b. As an initial matter, petitioners did not argue in the court of appeals that the court should review the district court's Batson conclusions under a de novo standard of review. On the contrary, petitioners acknowledged that the district court's findings are entitled to great deference. Petitioners also conceded application of the rule they now ask this Court to overturn -- namely, that preserved Batson challenges are reviewed for clear error and that unpreserved Batson challenges are reviewed for plain error. Pets. C.A. Br. 15-17. This Court normally does not review questions neither pressed nor passed on below, and should not do so here where the court of appeals adopted the standard of review advocated at the time by petitioners. See United States v. Ortiz, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below).

c. Even if petitioners had preserved their argument on the proper standard of review, review by this Court would be unwarranted both because the court of appeals correctly deferred to the district court's findings and because petitioners have made no effort to demonstrate that they would benefit from a de novo standard of review.

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[2] On appeal, petitioners challenged 11 of the prosecution's 37 peremptory strikes. In the district court, however, petitioners objected to only seven of those 11 strikes. Pet. App. 17. The court of appeals therefore reviewed the four other challenges for plain error. Id. at 19. In their petition for a writ of certiorari, petitioners do not appear to challenge the standard of review as to those four peremptory strikes.

i. The court of appeals carefully reviewed the district court's rejection of petitioners' Batson challenges, noting that the court was required "to closely analyze the prosecutor's proffered reason for each disputed strike in light of all the relevant circumstances," Pet. App. 16-17 (citing Miller-El v. Dretke, 545 U.S. 231, 241-242, 251-252 (2005) (Miller-El II)), and concluding that "[t]he record here demonstrates that the district court appropriately exercised its Batson responsibilities," id. at 17. As the court of appeals described, the district court's final ruling followed "three rounds of argument on each strike of an African-American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument." Ibid. "Throughout the hearing," moreover, "the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel." Ibid. Although the district court did not offer strike-specific reasons for its decision, the court of appeals properly concluded that the district court was justified in concluding "that the government's race-neutral explanations were genuine" and accordingly rejecting petitioners' Batson challenges "based on the arguments" of counsel and on the court's "personal observation of the prosecutors and of prospective jurors' demeanor." Ibid.

In addition to looking at the totality of the district court's handling of petitioners' Batson challenge, the court of appeals reviewed each of the 11 juror strikes challenged on appeal (including the four strikes petitioners failed to object to in the district court). Pet. App. 17-19. The court of appeals correctly affirmed the district court's rejection of those challenges, concluding that petitioners had failed on appeal either to rebut the government's race-neutral justifications or to demonstrate the type of "exceptional circumstances" that would overcome the usual deference to a district court's findings about the demeanor of potential jurors. Ibid. (quoting Snyder v. Louisiana, 552, U.S. 472, 477 (2008)). In addition, Judge Rogers (concurring in the majority's conclusion on the Batson issue) explained that even under a de novo standard of review of each of the challenged strikes she agreed that petitioners had not established purposeful discrimination by the prosecutor. Id. at 67-72.

The court of appeals also considered the context of the challenged strikes. Pet. App. 16-17; see Miller-El II, 545 U.S. at 240-241, 253-266 (considering "all relevant circumstances," as directed by this Court in Batson, 476 U.S. at 96-97). The court of appeals noted that the racial composition of the jury ultimately empaneled "mirrored the make-up of the venire." Id. at 17. And the court observed that "in this case there are no extrinsic indicators of racial discrimination of the kind found in successful Batson challenges" such as a widely known policy of excluding black jurors. Ibid. Thus, although the court correctly stated that "[t]he dismissal of even a single prospective juror on the basis of race violates equal protection principles," the court properly took note of the fact that "the circumstances of this case strongly suggest that the prosecution did not use its peremptory strikes to discriminate on the basis of race." Ibid.

ii. Although petitioners argue (Pet. 7-9) that a district court's findings of fact as to a Batson challenge are not entitled to deference when the court fails to provide detailed factual findings on the record as to each challenged juror, they do not cite a single case that supports their argument. In fact, "federal law has never required explicit fact-findings following a Batson challenge, especially where a prima facie case is acknowledged and the [non-moving party] presents specific nondiscriminatory reasons on the record." Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) (en banc), cert. denied, 556 U.S. 1168 (2009)). See also, e.g., Miller-El I, 537 U.S. at 347 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it."); Haynes v. Thaler, 438 Fed. Appx. 324, 329 (5th Cir. 2011) ("Although the Supreme Court stated in Batson that 'a [trial] court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"' the Court has not gone further and stated that a trial court must also make detailed on-the-record findings about that inquiry.") (internal citations omitted; brackets in original), cert. denied, No. 11-7988, 2012 WL 1379750 (Apr. 23, 2012); Green v. Lamarque, 532 F.3d 1028, 1030 n.2 (9th Cir. 2008) ("The Court in Batson did not state that the trial judge must describe this analysis on the record, only that it must 'undertake' such an analysis.").

Indeed, petitioners acknowledge (Pet. 8) that this Court in Snyder, supra, "adopted a clear error standard of review." Petitioners nevertheless urge the Court to adopt, for the first time, a de novo standard of review for Batson challenges arising in federal trials. Relying on Judge Rogers' concurring opinion, petitioners explain that, when the Court established the clearly erroneous standard of review in Hernandez, supra, it expressed "federalism concerns" about permitting too searching a review of state-court determinations -- concerns that would not arise in appellate review of federal district court Batson decisions. Pet. 8 (citing Pet. App. 70 n.3 (Rogers, J., concurring)). But the Court in Hernandez invoked federalism concerns as a reason not to apply a standard of review of state-court factual findings that is more searching than that applied to factual findings of federal district courts. 500 U.S. at 369. The Court had already noted both that it treats intentional-discrimination findings as factual findings and that it had held that factual findings made in a criminal case by a federal district court on issues other than guilt are subject to clearly erroneous review. Id. at 364-366. Petitioners offer no reason to depart from that longstanding practice now.

iii. At any rate, this case would not present an appropriate vehicle in which to reconsider the precise degree of deference owed to a trial court's ultimate conclusion under the third step of the Batson analysis because a resolution of that question in petitioners' favor would not entitle them to a new trial. Even under her de novo review of the record, Judge Rogers concluded that petitioners had not met their burden of establishing purposeful discrimination. Pet. App. 71-72. Petitioners do not even attempt to establish that the panel majority would have reached a different result had it applied the same de novo standard of review. Indeed, although the panel majority reviewed in detail each of the 11 strikes petitioners challenge, id. at 17-19, petitioners do not take issue in their petition for a writ of certiorari with any particular conclusion on the majority's part. Petitioners do not discuss any individual struck juror, instead merely requesting that the court of appeals be instructed to redo its task under a stricter standard of review (a standard not even requested by petitioners when they were before the court of appeals). Given the thoroughness of the panel majority's review of the record, nothing suggests that the majority's independent and thorough review of the record would yield a different result. As a result, this Court's reconsideration of the appropriate standard of review would be unlikely to alter the outcome in this case.

d. Petitioners also argue (Pet. 8-11) that the court of appeals' analysis, which focused on "one plausible justification for each strike" where "multiple justifications [were] proffered," Pet. 9, conflicts with this Court's decision in Snyder. That claim is without merit. In Snyder, the prosecutor had offered two race-neutral justifications for a challenged juror strike, one that was demeanor-based and one that was not. The state trial court rejected the Batson challenge without indicating which of the two explanations (or both) it was crediting. Snyder, 552 U.S. at 478-479. This Court reviewed the trial court's decision under a clearly erroneous standard, noting that deference was due to any determinations by the trial court about credibility and demeanor. See id. at 477. The Court concluded that the non-demeanor-based justification "fail[ed] even under the highly deferential standard of review that is applicable here." Id. at 479. Because the state court did not indicate its basis for accepting the prosecution's argument, this Court "c[ould ]not presume" that the trial court had credited the prosecutor's demeanor-based explanation rather than the explanation this Court found to be invalid. Ibid. The Court therefore reversed the conviction and remanded for further proceedings. Id. at 485-486.

The court of appeals' decision in this case does not conflict with the decision in Snyder. The court of appeals acknowledged the statement in Snyder that, "in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Pet. App. 17 (quoting Snyder, 552 U.S. at 478). After considering multiple factors, the court of appeals then concluded that "[t]he overall facts and circumstances of this case * * * do not support appellants' claims of intentional discrimination." Ibid. The fact that the court of appeals' opinion addresses the prosecutor's primary justification for each of the challenged strikes does not indicate that the court failed to consider the other justifications. Petitioners and their co-defendants briefed their Batson arguments at length, see Pets. C.A. Br. 14-53, and the government presented a lengthy and detailed response to those claims, see Gov't C.A. Br. 27-74. The salient difference between Snyder and this case is that the Court in Snyder found one of the proffered justifications to be a pretext for intentional discrimination; it was therefore critical that the reviewing courts could not tell which justification the trial court had in fact relied on. In their petition for a writ of certiorari, petitioners do not identify a single justification found by the court of appeals to be valid that this Court should conclude is pretextual.[3]

Finally, petitioners do not even suggest that the court of appeals' approach to considering multiple proffered explanations from the prosecutor conflicts with any decision from another court of appeals. That is a sufficient reason not to grant review of that question.

2. Petitioner Smith also contends (Pet. 11-15) that the district court erred in refusing to instruct the jury that the government bears the burden of proving beyond a reasonable doubt that petitioner did not withdraw from the charged conspiracies. The court of appeals correctly rejected that argument. Pet. App. 57-58. Although the courts of appeals are divided on the proper allocation of proof when a defendant asserts the affirmative defense of withdrawal, resolution of that division is not appropriate in this case. Because any error in the district court's instructions was harmless, petitioner would not be entitled to a

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[3] Petitioners acknowledge in passing (Pet. 11 (cross-reference cite to Snyder, 552 U.S. at 485)) that this Court has "le[ft] open [the] question whether, where one explanation is pretextual, [the] government might be able to save [a] strike by proving it would have stricken [the] jur[or] for nonpretextual reasons alone." But petitioners did not raise that particular question below and do not identify it as a question presented in their petition for a writ of certiorari. See Pet. i. Nor do petitioners identify any disagreement among the court of appeals on that question. In any case, because petitioners have not identified any pretextual justifications proffered by the government, that issue is not presented in this case.

new trial regardless of the resolution of the question presented. Further review of this question is therefore not warranted.

a. As the court of appeals correctly noted, due process requires the government in every criminal trial to prove beyond a reasonable doubt every element of the charged offense. Pet. App. 57 (citing, inter alia, In re Winship, 397 U.S. 358 (1970)). The absence of withdrawal is not, however, an element of the crime of conspiracy. Withdrawal is an affirmative defense and the court of appeals correctly held that a defendant asserting such a defense bears the burden of proving that he withdrew from a conspiracy.

When the government proves beyond a reasonable doubt that a defendant was a member of an ongoing conspiracy, it has satisfied its burden under the Due Process Clause. And, as the court of appeals recognized, a conspiracy is a crime that is presumed to continue until accomplishment of the aim of the conspiracy or termination of the agreement. Pet. App. 57. A defendant who has been shown to be part of an ongoing conspiracy remains a member of such conspiracy -- and therefore remains liable for the ongoing crimes of his co-conspirators -- unless or until he withdraws from the conspiracy. Hyde v. United States, 225 U.S. 347, 368-370 (1912). Thus, a defendant's participation in the conspiracy continues even if he does not perform any acts in furtherance of the conspiracy. Such a defendant may not assert a withdrawal defense "until he does some act to disavow or defeat the purpose" of the conspiracy. Id. at 369.

This Court has long held that a defendant who claims that he withdrew from a conspiracy must show some "affirmative action" constituting withdrawal. Hyde, 225 U.S. at 369. In particular, a defendant must show both that he ceased participating in the conspiracy and that he either disclosed the conspiracy to the authorities or performed some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978). Significantly, even if a defendant can establish that he withdrew from the conspiracy, such withdrawal does not excuse him from criminal liability for his prior conspiratorial acts and those of his co-conspirators. Rather, a proven withdrawal from a conspiracy both terminates a defendant's liability for future acts of his former co-conspirators and starts the running of the statute of limitations on his own liability for pre-withdrawal actions by and for the conspiracy. See id. at 465 n.38.

b. In keeping with this Court's statement in Hyde that a defendant wishing to assert the affirmative defense of withdrawal from a conspiracy must establish some "affirmative action" constituting withdrawal, 225 U.S. at 369, a majority of the courts of appeals have held that a defendant bears the burden of proving that he withdrew from a conspiracy. See, e.g., United States v. Fishman, 645 F.3d 1175, 1196-1197 (10th Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012); United States v. Eppolito, 543 F.3d 25, 49 (2d Cir. 2008), cert. denied, 555 U.S. 1148 (2009); United States v. Westry, 524 F.3d 1198, 1216-1217 (11th Cir.), cert. denied, 555 U.S. 909 (2008); United States v. Brown, 332 F.3d 363, 374 (6th Cir. 2003); United States v. Pettigrew, 77 F.3d 1500, 1514 (5th Cir. 1996); United States v. Dyer, 821 F.2d 35, 38-39 & n.6 (1st Cir. 1987).[4]

The Fourth, Seventh, and Ninth Circuits have held that, although a defendant bears the initial burden of presenting prima facie evidence that he withdrew from the conspiracy, if he does so the burden of persuasion as to the lack of withdrawal shifts back to the government. See, e.g., United States v. Lothian, 976 F.2d 1257, 1261-1262 (9th Cir. 1992); United States v. West, 877 F.2d 281, 289 (4th Cir.), cert. denied, 493 U.S. 959 (1989); United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981). The Third Circuit has adopted a similar burden-shifting model, although that court's approach to what type of evidence is necessary to establish withdrawal (as opposed to who has the burden of proving withdrawal) is somewhat different than that of other courts of appeals. See United States v. Antar, 53 F.3d 568, 583 (3d Cir. 1995), abrogated on other grounds by Smith v. Berg, 247 F.3d 532 (3d Cir. 2001).[5] The Eighth Circuit may also have adopted the burden-shifting approach. That court has stated that the defendant has the burden of proving withdrawal without distinguishing between the burden of production and the burden of persuasion, see United States v. Wessels, 12 F.3d 746, 750 (1993), cert. denied, 513 U.S. 831 (1994); United States v. Boyd, 610 F.2d 521, 528 (1979), cert. denied, 444 U.S. 1089 (1980), more recently in the context of deciding sentencing issues, see United States v. Williams, 605 F.3d 556, 569 (2010); United States v. Spotted Elk, 548 F.3d 641, 676 (2008), cert. denied, 556 U.S. 1145 (2009). In United States v. Grimmett, 236 F.3d 452, 454 (2001), however, the court relied on the Third Circuit's decision in Antar, supra, stating that "[t]hough [the defendant] had the burden to prove withdrawal, the government had the burden to come forward with evidence rebutting her prima facie showing."

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[4] The court of appeals cited Dyer as taking the minority view, Pet. App. 57, and petitioners do as well, Pet. 13-14. But in Dyer, the First Circuit upheld a challenged instruction stating that, although the government bears the burden of proving the essential elements of conspiracy, a defendant who "contends he withdrew or was abandoned from the conspiracy" bears the burden of demonstrating that defense. 821 F.2d at 39 & n.6.

---

[5] In Antar, the Third Circuit explained:

> [I]f the defendant completely severs his or her relationship with the enterprise, he or she has established a prima facie showing of withdrawal from the conspiracy without showing any other affirmative act inconsistent with the conspiracy and without giving any further notice to his or her co-conspirators. Once the defendant makes this showing, the burden shifts to the government either to rebut the defendant's showing or to establish that the defendant continued to participate as a co-conspirator. However, if the defendant has not completely severed his ties with the enterprise, then in order to establish a prima facie case, he must demonstrate either that he gave notice to his co-conspirators that he disavows the purpose of the conspiracy or that he did acts inconsistent with the object of the conspiracy.

53 F.3d at 583.

Only the Seventh and Ninth Circuits have provided a rationale for the burden-shifting allocation of proof. In Read, supra, the Seventh Circuit construed this Court's decision in Hyde as holding that the defendant has "only the burden of going forward" but that the government had the burden of disproving withdrawal beyond a reasonable doubt. 658 F.2d at 1233-1236. In the Seventh Circuit's view, proof of withdrawal "negates" one of "the essential element[s]" of a charge of conspiracy, namely "membership." Id. at 1236. In order to comport with due process, the court reasoned, the government bears the burden of persuasion to disprove the defense of withdrawal once a defendant meets his burden of going forward with evidence that he withdrew prior to the limitations period. Ibid. The Ninth Circuit adopted similar reasoning in Lothian (which involved mail and wire fraud charges rather than conspiracy), although in its view proof of withdrawal "negates the element of agreement to the conspiracy's unlawful objective." 976 F.3d at 1261 (citing Read, 658 F.2d at 1232).

The reasoning of those courts is unpersuasive. The Due Process Clause does not require the government to bear the burden of disproving an affirmative defense. See Patterson v. New York, 432 U.S. 197, 210 (1977) ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required."). Nor is the Due Process Clause violated simply because evidence introduced to support an affirmative defense, on which the defendant bears the burden of proof, may "tend to negate" an element of the crime. Martin v. Ohio, 480 U.S. 228, 233-234 (1987) (holding that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense even though "evidence offered to support the defense may negate a purposeful killing by prior calculation and design").

Moreover, the premise of those decisions' due process analysis -- that withdrawal from a conspiracy negates an element of the offense -- is incorrect. "To the contrary, a defendant's withdrawal from a conspiracy tends to confirm, rather than deny, his prior membership in it." United States v. Hamilton, 538 F.3d 162, 174 (2d Cir. 2008). Although withdrawal may "become[] a complete defense * * * when coupled with the defense of the statute of limitations," Read, 658 F.2d at 1233, even then it does not negate the element of membership in the conspiracy or agreement to the conspiracy's unlawful objective. Rather, the statute of limitations defense "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts." United States v. Scott, 437 U.S. 82, 111 (1978). Thus, like the duress defense that this Court considered in Dixon v. United States, 548 U.S. 1 (2006), it does not "controvert any of the elements of the offense itself," but instead "allows the defendant to avoid liability." Id. at 6-7 (internal quotation marks and citation omitted). See also United States v. Titterington, 374 F.3d 453, 456 (6th Cir. 2004), cert. denied, 543 U.S. 1153 (2005); United States v. Knipp, 963 F.2d 839, 844 (6th Cir. 1992); United States v. Walsh, 700 F.2d 846, 856 (2d Cir.), cert. denied, 464 U.S. 825 (1983). Indeed, like the defendant in Martin (which addressed the affirmative defense of self-defense), petitioner Smith does not appear to dispute the existence of the elements to establish a conspiracy; he instead contends that he is entitled to an affirmative defense to liability for his conspiratorial actions and the criminal actions of his co-conspirators. See Martin, 480 U.S. at 234. Thus, as was the case in Dixon with respect to the defense of duress, due process is not offended by jury instructions that place the burden on a defendant to prove withdrawal from the conspiracy. See 548 U.S. at 8.

c. In any event, this case is not an appropriate vehicle to resolve any conflict in the courts of appeals on this issue because petitioner Smith will not benefit even if the circuit split is resolved in his favor. Although petitioner Smith does not identify in his petition for a writ of certiorari what evidence he would rely on in support of his withdrawal defense, in the court of appeals he relied on the fact of his incarceration beginning in

1994 and on the testimony of a government witness that petitioner Smith told the witness he refused in 1997 to comply with a 1997 directive from Gray (a leader of the conspiracy) to kill that witness. Pets. C.A. Br. 294-296. Even in the courts of appeals that have adopted some version of a burden-shifting framework that petitioner Smith presumably prefers, such evidence would not establish the affirmative defense of withdrawal.

Under the Third Circuit's approach, petitioner Smith would not have met his prima-facie burden because he neither "gave notice to his co-conspirators that he disavow[ed] the purpose of the conspiracy" nor "did acts inconsistent with the object of the conspiracy." Antar, 53 F.3d at 583. At most, petitioner Smith's imprisonment resulted in a "mere cessation of activity," which is not "sufficient to establish withdrawal." Id. at 582. And his alleged refusal to commit one murder does not establish that he committed acts that were inconsistent with the goals of the drug-trafficking and RICO conspiracies. In any case, that alleged incident occurred in 1997 -- i.e., within the limitations period[6] -- and could easily be viewed as evidence that petitioner Smith was still part of the conspiracy when the conspiracy's leader asked him to commit the murder. See Gov't C.A. Br. 292-294.

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[6] As noted at n.1, supra, petitioner Smith was charged in the second superseding indictment, filed on November 17, 2000. The statute of limitations for the conspiracy counts against him is five years. 18 U.S.C. 3282.

Petitioner Smith would not have fared any better in the other circuits that employ a burden-shifting approach. The mere fact of petitioner Smith's imprisonment did not establish that he withdrew from the conspiracies. See, *e.g.*, *United States* v. *Nava-Salazar*, 30 F.3d 788, 799 (7th Cir.) (noting that "the mere fact of Nava's arrest and incarceration was insufficient to show withdrawal" without evidence that he took affirmative action to withdraw and defendant therefore was not entitled to withdrawal instruction), cert. denied, 513 U.S. 1002 (1994); cf. *United States* v. *Diaz*, 176 F.3d 52, 98 (2d Cir.) ("[N]either authority nor reason would suggest that imprisonment necessarily shows a withdrawal.") (quoting *United States* v. *Borelli*, 336 F.2d 376, 389 (2d Cir. 1964)), cert. denied, 528 U.S. 875 (1999). On the contrary, the evidence presented at trial established that petitioner Smith pleaded guilty to the offense that sent him to prison in order to allow Gray to plead guilty to a misdemeanor offense. Gov't C.A. Br. 294-296. Gray, in turn, rewarded petitioner Smith by supplying Smith with marijuana while Smith was in prison and by sending money to Smith and his wife. *Id.* at 294-295. In addition, petitioner Smith looked out for the interests of the conspiracy while he was in prison by providing information to Gray about a suspected cooperator and by threatening a cooperating witness. *Id.* at 295. Far from establishing that petitioner Smith took some affirmative step to withdraw from the conspiracy, the evidence thus shows that

Smith continued his association with Gray and other members of the conspiracy while he was in prison.

Thus, even if a court of appeals employing a burden-shifting framework might find that petitioner Smith established a prima facie case of withdrawal, the ample evidence establishing Smith's continued participation in the conspiracies rebutted any such showing. Any instructional error about who bore the ultimate burden on the defense of withdrawal was therefore harmless. Because resolution of the proper allocation of such burdens would not make a difference in the outcome of petitioner Smith's case, the issue does not warrant review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

KIRBY A. HELLER
Attorney

MAY 2012

# REPLY
# BRIEF

No. 11-8976

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

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CALVIN SMITH and JOHN RAYNOR,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# REPLY BRIEF FOR PETITIONERS

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## I. THE DECISION BELOW IS IN CONFLICT WITH SNYDER V. LOUISIANA.

The decision below is in conflict with this Court's decision in Snyder v. Louisiana, 552 U.S. 472 (2008). The government concedes that the D.C. Circuit's opinion only "addresses the prosecutor's primary justification for each of the challenged strikes" but argues that that "does not indicate that the court failed to consider the other justifications." (Opp. at 21). The government notes (id.) that the D.C. Circuit cited Snyder in saying that "[t]he overall facts and circumstances of this case thus do not support appellant's claim of intentional discrimination." Pet. App. 17. But that statement, and the court's acknowledgment that "'all of the circumstances that bear upon the issue of racial animosity must be consulted'" (Pet. App. 17 (quoting Snyder, 552 U.S at 478)), were made in reference to the court's discussion of circumstances other than the reasons given for each strike, such as the ultimate racial makeup of the jury. When the court then proceeded in the next section of its opinion to discuss the challenged strikes, it upheld each one based on the plausibility of a single justification. Under Snyder, an appellate court "cannot presume" that the trial court relied on a particular explanation. Snyder, 552 U.S. at 479. Contrary to Snyder, the D.C. Circuit simply "presume[d]" that the trial court relied on the reason the appellate court selected to discuss and that the pretextual nature of any explanation it did not review, would not have altered the D.C. Circuit's ultimate conclusion.

## II. THE FACT THAT THE JURY SPECIFICALLY INQUIRED ABOUT ACQUITTING BASED ON WITHDRAWAL INDICATES THAT ANY BURDEN-OF-PROOF ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT, MAKING THIS A GOOD VEHICLE FOR RESOLUTION OF THE BURDEN-OF-PROOF CIRCUIT SPLIT.

The government acknowledges that there is a deep circuit split on the due process question presented by this petition: whether, where a defendant makes out a prima facie case of withdrawal from a conspiracy before the statute of limitations period, due process requires that the government bear the burden of persuasion on the question whether the defendant was a member of the conspiracy during the relevant period.

The government finds the reasoning of the cases placing the burden of persuasion on the government "unpersuasive" (Opp. at 27), arguing that withdrawal is an affirmative defense and that the Due Process Clause is not violated "simply because evidence introduced to support an affirmative defense, on which the defendant bears the burden of proof, may 'tend to negate' an element of the crime." (Opp. at 28). The government also takes issue with the premise that withdrawal from a conspiracy before the statute of limitations period negates an element of the offense. (Opp. at 28-29). But whether the government's arguments on the merits are correct is the very question presented in this petition. The fact that the government believes its analysis is superior to that of some federal appellate courts is not a reason not to settle the question and resolve the circuit split.

The government also argues that, in any event, review is not warranted because Petitioner Smith will not benefit if the circuit split is resolved in his favor: "[E]ven if a court of appeals employing a burden-shifting framework might find that petitioner Smith established a prima facie case of withdrawal,[1] the ample evidence establishing Smith's continued participation in the conspiracies rebutted any such showing." (Opp. at 32). But whether Mr. Smith's withdrawal evidence was adequately rebutted is a classic jury question - one the jurors were struggling with during deliberations - and it is hardly clear beyond a reasonable doubt that the outcome would have been the same if the burden of persuasion had been placed on the government instead of Mr. Smith.[2]

Indeed, the jurors would not have asked about withdrawal if they did not consider the issue potentially dispositive. Their note specifically asked whether they should acquit if they found a defendant left the conspiracy before the relevant date. Pet. App. 57 ("If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?"). The jurors would not have asked this question if they did not think Smith's withdrawal was a legitimate issue raised by the evidence. Certainly, the issue of harmlessness raised by the government here is not so clear cut that it should not be addressed by the D.C. Circuit in the first instance. It is not a reason to deny review in this case.

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[1] The district court instructed on withdrawal and the D.C. Circuit gave no indication that Mr. Smith had not met his burden of production such that the burden of proof question did not matter. In these circumstances, this Court should not deny review on the basis of a fact-specific inquiry never undertaken by the lower court. The D.C. Circuit applied an incorrect legal rule and should have the opportunity in the first instance to apply the correct rule to the facts of this case.

[2] Because the error at issue - burden-shifting in violation of due process - is constitutional in nature, the strict harmless error standard of Chapman v. California, 386 U.S. 18, 24 (1967), will apply.

The government does not dispute that the due process question presented by this petition is an important question that arises frequently in conspiracy trials. The existing circuit split creates uncertainty[3] and inequity and should be resolved by this Court in this case.

Respectfully submitted,

A.J. KRAMER,
FEDERAL PUBLIC DEFENDER

Lisa B. Wright
LISA B. WRIGHT
(Counsel of Record)
ASSISTANT FEDERAL PUBLIC DEFENDER
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Calvin Smith and John Raynor

---

[3] Here, when the jury note came, the government originally sought to put the withdrawal burden on the defendant but then, having looked at the circuit split, switched positions and decided not to object to the court placing the withdrawal burden on the government. (Pets. C.A. Br. 282). The district court, however, gave the instruction originally proposed by the government. (Pets. C.A. 283).

# JOINT
# APPENDIX

No. 11-8976

IN THE

# Supreme Court of the United States

CALVIN SMITH AND JOHN RAYNOR,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

# JOINT APPENDIX

DONALD B. VERRILLI JR.,
SOLICITOR GENERAL
*Counsel of Record for Respondent*
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

A. J. KRAMER,
FEDERAL PUBLIC DEFENDER
*Counsel of Record for Petitioners*
625 Indiana Avenue, N.W.
Suite 550
Washington, DC 20004
(202) 208-7500
A._J._Kramer@fd.org

PETITION FOR CERTIORARI FILED FEBRUARY 27, 2012
CERTIORARI GRANTED JUNE 18, 2012

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## APPENDIX A — RELEVANT DOCKET ENTRIES

**United States Court of Appeals**
**for District of Columbia Circuit**
**Court of Appeals Docket #: 05-3052**
**USA v. Calvin Smith**
**Appeal From: United States District Court**
**for the District of Columbia**
**Fee Status: IFP**
**Docketed: 03/31/2005**
**Termed: 07/29/2011**

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| 03/24/2011 | ORAL ARGUMENT HELD before Judges Sentelle, Rogers and Kavanaugh. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 07/29/2011 | PER CURIAM JUDGMENT filed [1321411] that the judgment of the District Court appealed from in these causes is hereby affirmed in part, vacated in part, and the cases are remanded for further proceedings for the reasons in the accompanying opinion. Before Judges: Sentelle, Rogers and Kavanaugh. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 07/29/2011 | OPINION filed [1321413] PER CURIAM OPINION (Pages: 128), CONCURRING OPINION (Pages: 12) by Judge Rogers [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |

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| 09/23/2011 | PER CURIAM ORDER filed [1331339] Upon consideration of appellantsâ€™ unopposed motion to exceed page limits for the petition for rehearing and rehearing en banc and the lodged petition, and appellantsâ€™ unopposed motion to supplement the appendix and the lodged supplemental appendix attached to the motion for leave, it is ORDERED, that the motions be granted. The Clerk is directed to file the lodged documents. Before Judges: Sentelle, Rogers and Kavanaugh. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 09/23/2011 | PER ABOVE ORDER lodged petition for rehearing en banc [1328309-2], petition for rehearing [1328309-3] is filed [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 10/13/2011 | CLERK'S ORDER filed [1335022] Upon consideration of the petition for rehearing, it is ORDERED, on the courtâ€™s own motion, that within 15 days of the date of this order, appellee file a response to the petition for rehearing limited to the issue of the conspiracy withdrawal instruction. The response may not exceed 15 pages. Absent further order of the court, the court will not accept a reply to the response. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |

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| 10/28/2011 | RESPONSE FILED [1338540] by USA in 05-3050, 05-3051, 05-3053, 05-3054, 05-3064 to petition for rehearing en banc [1328309-2], petition for rehearing [1328309-3] [Service Date: 10/28/2011 by CM/ECF NDA] Pages: 11-15. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] (Gerardo, Leslie) |
| 11/30/2011 | PER CURIAM ORDER filed [1344753] denying petition for rehearing [1328309-3] Before Judges: Sentelle, Rogers and Kavanaugh. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 11/30/2011 | PER CURIAM ORDER, En Banc, filed [1344756] denying petition for rehearing en banc [1328309-2] Before Judges: Sentelle, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh. [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |
| 12/22/2011 | MANDATE ISSUED to Clerk, District Court [05-3050, 05-3051, 05-3052, 05-3053, 05-3054, 05-3064] |

## U.S. District Court
## District of Columbia (Washington, DC)
## CRIMINAL DOCKET FOR CASE #: 1:00-cr-00157-RCL All Defendants

**Case title: UNITED STATES OF AMERICA v. GRAY et al**

**Date Filed: 05/05/2000**

| | | |
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| 11/17/2000 | 102 | SUPERSEDING INDICTMENT filed against KEVIN L. GRAY (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, 7s, 8s, 9s, 10s, 11s, 12s, RODNEY L. MOORE (2) count(s) 1s, 2s, 3s, 4s, 5s, 8s, 9s, 10s, 11s, 12s, JOHN RAYNOR (5) count(s) 1s, 3s, FRANK HOWARD (7) count(s) 1s, 3s, BRYAN BOSTICK (9) count(s) 1s, 3s, 12s, DERRICK MOORE (10) count(s) 1s, 3s, ROY JOHNSON (11) count(s) 1s, 3s, KENNETH SIMMONS (12) count(s) 1s, 3s, WILFORD OLIVER (13) count(s) 1s, 3s, CALVIN SMITH (14) count(s) 1, 3, LARRY WILKERSON (15) count(s) 1, 3, TIMOTHY P. HANDY (16) count(s) 1, 3, LIONEL DEWITT NUNN (17) count(s) 1, 3, RONALD C. ALFRED (18) count(s) 1, 3, 4, 5, 12, JAMES W. ALFRED (19) count(s) 1, 3, 6, 7, 10, 11, FRANKLIN SEEGERS (20) count(s) 1, 3, DEON OLIVER (21) count(s) 1, 3. (jdm) (Entered: 12/01/2000) |

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| 11/22/2000 | | ARRAIGNMENT held before Judge Royce C. Lamberth as to, CALVIN SMITH (14) count(s) 1, 3, 26, 85, 94, 96 : Attorney appearance for CALVIN SMITH by Mona Asiner for John Carney. Plea not guilty entered by CALVIN SMITH (14) count(s) 1, 3, 26, 85, 94, 96. Status hearing set for 10:00 12/8/00; detention hearing set for 10:00 11/28/00 for CALVIN SMITH. Defendant committed/commitment issued. Reporter: Theresa Sorensen (jdm) (Entered: 01/12/2001) |
| 03/20/2001 | 242 | MOTION filed by CALVIN SMITH to dismiss count(s) as to CALVIN SMITH (14) count(s) 1, 3, 96ss and overt acts because the statute of limitations has expired (jdm) (Entered: 03/22/2001) |
| 12/10/2001 | 563 | MOTION filed by CALVIN SMITH for leave to late file attached motion to dismiss counts one and three of the superseding indictment: Defense of Statute of limitations and withdrawal asserted. ; EXHIBIT (Motion to dismiss counts one and three of the superseding indictment: defense of Statute of Limitations and withdrawal asserted) (hsj) (Entered: 12/11/2001) |

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| 01/02/2002 | 603 | RESPONSE (OMNIBUS) by USA in opposition to defendants' pretrial motions. Exhibits (14) (hsj) Modified on 01/04/2002 (Entered: 01/04/2002) |
| 01/09/2002 | 612 | REPLY by CALVIN SMITH to response in opposition to defendant's pretrial motions (aet) (Entered: 01/10/2002) |
| 11/20/2002 | 1144 | REQUEST FOR THEORY OF THE CASE INSTRUCTIONS by CALVIN SMITH . (hsj) (Entered: 11/26/2002) |
| 12/10/2002 | 1160 | THE COURT'S FINAL JURY INSTRUCTIONS as to KEVIN L. GRAY, RODNEY L. MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY P. HANDY JR., LIONEL DEWITT NUNN (mlp) (Entered: 12/24/2002) |
| 01/03/2003 | 1229 | JURY NOTE (1) filed as to KEVIN L. GRAY, RODNEY L. MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY P. HANDY JR., LIONEL DEWITT NUNN. (mlp) (Entered: 01/28/2003) |
| 01/03/2003 | 1230 | RESPONSE BY THE COURT TO JURY NOTE filed as to KEVIN L. GRAY, RODNEY L. MOORE, |

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| | | JOHN RAYNOR, CALVIN SMITH, TIMOTHY P. HANDY JR., LIONEL DEWITT NUNN. (mlp) (Entered: 01/28/2003) |
| 01/07/2003 | 1176 | REQUEST filed by CALVIN SMITH for supplemental and corrective instructions. (hsj) Modified on 01/08/2003 (Entered: 01/08/2003) |
| 01/09/2003 | | JURY TRIAL before Judge Royce C. Lamberth as to , CALVIN SMITH (14) counts 1rrs, 3rrs, 20rrs, 4rrs, 5rrs, 15rrs, 19rrs, 16rrs: same jury of 12. Jury deliberations resumed; partial verdict returned and published at 9:15 a.m. Jury polled. Jury deliberations resumed on remaining counts. Verdict on remaining counts returned and published at 4:30 p.m. Jury polled. Verdict of guilty rendered as to CALVIN SMITH (14) counts 1rrs, 3rrs, 4rrs, 5rrs, 15rrs, 19rrs, and 20rrs. Verdict of not guilty rendered as to CALVIN SMITH (14) count 16rrs. Defendant committed/commitment issued. Reporter: Theresa Sorensen (mlp) Modified on 03/03/2003 (Entered: 02/14/2003) |
| 01/15/2003 | 1204 | MOTION filed by CALVIN SMITH for judgment of acquittal , and request |

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| | | to extend time to file a motion for new trial or supplement motion for judgment of acquittal (hsj) (Entered: 01/16/2003) |
| 04/07/2003 | 1375 | SUPPLEMENTALMEMORANDUM by CALVIN SMITH in support of renewed motion for judgment of acquittal [1204-1] by CALVIN SMITH (mlp) (Entered: 04/08/2003) |
| 03/09/2005 | | Minute Entry for proceedings held before Judge Royce C. Lamberth :sentencing as to CALVIN SMITH held on 3/9/2005. Sentenced to LIFE imprisonment as to Counts 1rrs, 3rrs, and 5rrs; Twenty-Five (25) years to LIFE as to Counts 4rrs, 15rrs, 19rrs, and 20rrs; all counts to be served concurrently. A Fine of $10,000.00 on each of Counts 1rrs, 3rrs, and 5rrs, for a total Fine of $30,000.00, due immediately; interest and penalties on Fine are waived. A special assessment of $100.00 for each of Counts 1rrs and 3rrs and $50.00 for Count 5rrs; a total of $250.00 due immediately on U.S. Code Offenses. A special assessment of $100.00 each for each of Counts 4rrs, 15rrs, 19rrs, and 20rrs; a total of $400.00 due immediately on D.C. Code Offenses. Supervised release of |

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| | | Five (5) years for Counts 1rrs, 3rrs, and 5rrs, to run concurrently. Count 16rrs, Not guilty verdict rendered by the jury. Counts 85, 94, 96, Dismissed upon order of the Court. Defendant committed/commitment issued. (Court Reporter Theresa Sorensen.) (mlp, ) (Entered: 03/29/2005) |
| 03/11/2005 | 2165 | NOTICE OF APPEAL by CALVIN SMITH re judgment of conviction and order of sentence imposed on 3/9/05, entered on 3/29/05. CJA - no filing fees paid. Docketing statement not received. Parties notified. (mlp, ) (Entered: 03/29/2005) |

# APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, DECIDED JULY 29, 2011

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-3050, 05-3051, 05-3052,
05-3053, 05-3054, 05-3064.

UNITED STATES of America,

Appellee

v.

Rodney L. MOORE, also known as Rasoo,

Appellant.

Argued March 24, 2011.
Decided July 29, 2011.

Before: SENTELLE, Chief Judge, and ROGERS[1] and KAVANAUGH,[2] Circuit Judges.

Opinion for the Court filed PER CURIAM.

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[1] Circuit Judge Rogers concurs in part in Part I, *see infra* concurring opinion, and in part in Part V, *see infra* note 11.

[2] Circuit Judge Kavanaugh does not join Parts IV.A.1 and IV.A.2.

Opinion concurring in part in Part I filed by Circuit Judge ROGERS.

PER CURIAM:

[TABLE OF CONTENTS INTENTIONALLY OMITTED]

Six defendants appeal from judgments of conviction in the district court on multiple charges, including drug conspiracy, RICO conspiracy, continuing criminal enterprise, murder, and other related charges in violation of federal and District of Columbia laws. They assert a wide variety of alleged errors covering, among other things, evidentiary issues, both as to admission and sufficiency; conduct of the trial; prosecutorial misconduct; and jury instructions. Upon review, we conclude that most of the asserted errors either were not erroneous or were harmless. As to one category of issue involving alleged violations of the Confrontation Clause of the Constitution, a Supreme Court decision intervening between the trial and our consideration of the case compels us to remand convictions of some drug charges (Counts 126-138) for further consideration by the district court in light of the Supreme Court's opinion. We also remand for further proceedings a claim of ineffective assistance of counsel raised by appellant Smith (Counts 4 and 5). We vacate one murder conviction as to appellant Moore that, as the parties agree, merges with another conviction (Count 32).

* * *

According to the indictment in the district court and the evidence of the United States at trial, during the late 1980s and 1990s, appellants Rodney Moore, Kevin Gray, John Raynor, Calvin Smith, Timothy Handy, and Lionel Nunn, along with others, some of whom were also indicted but tried separately, conspired to conduct and did conduct an ongoing drug distribution business in Washington, D.C. In the course of conducting that business, various of the co-conspirators committed a wide-ranging course of violence including 31 murders. The United States obtained a 158-count superseding indictment upon which the defendants were tried by a jury. After a trial lasting over ten months, the jury returned verdicts of guilty on several of the charges, including the drug conspiracy, 21 U.S.C. § 846, the RICO conspiracy, 18 U.S.C. § 1962(d), continuing criminal enterprise (Moore and Gray), 21 U.S.C. § 848(a)-(b), murder, D.C. Code § 22-2401, -3202; D.C. Code § 22-2101; 18 U.S.C § 1959(a)(1); 21 U.S.C. § 848(e)(1)(A); 18 U.S.C. § 1512, assault with intent to murder (Moore and Gray), D.C. Code § 22-503, -3202, illegal use of a firearm (Moore, Gray, Raynor, Handy, and Nunn), 18 U.S.C. § 924(c), distribution of cocaine base and heroin (Gray), 21 U.S.C. § 841(a)(1), possession with intent to distribute heroin (Raynor), *id.*, and tampering with a witness (Handy), 18 U.S.C. § 1512(b). The trial court entered judgment imposing substantial criminal sentences generally amounting to terms in excess of life imprisonment from which the defendants now appeal.

Further details of the facts, evidence, and proceedings will be set forth as necessary for the discussion of the issues raised by appellants.

## I.[3]

The Constitution's equal protection guarantee bars prosecutors from using peremptory challenges to strike prospective jurors on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In this case, although 9 of the 12 jurors were African-American, appellants argue that the prosecution unconstitutionally used its peremptory challenges to remove prospective jurors who were African-American. The district court rejected appellants' challenge. We affirm the district court's decision.

A *Batson* challenge proceeds in three steps: *First*, the defendant must establish "a *prima facie* case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial." *Second*, "the State [must] come forward with a neutral explanation for challenging jurors within an arguably targeted class." *Third*, the "trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (alterations and internal quotation marks omitted). In the district court, appellants argued that the prosecution's use of 34 peremptory strikes to remove African-Americans from the venire for regular jurors established a *prima facie* case of discrimination. Accepting that the *prima facie* hurdle was cleared, the district court required the prosecution to explain each of its peremptory challenges of African-Americans. After the prosecution provided those explanations, the district court required further argument from both sides as part of *Batson's* final stage. The court allowed the defense counsel to dispute the validity of each government explanation and required the prosecution to individually respond to the defense's argument on each disputed strike. The court actively engaged in the entire process, consulting its notes and correcting and questioning counsel. At the conclusion of the multi-hour hearing, the district court ruled that appellants had not "established purposeful discrimination." *Miller-El*, 545 U.S. at 239; *see also Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

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[3] Circuit Judge Rogers filed a separate opinion concurring in part in Part I.

In this court, appellants dispute the district court's conclusion that there was no *Batson* violation.

### A.

Appellants' challenge to the district court's *Batson* decision faces a demanding standard. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). The Supreme Court has emphasized that the "trial court has a pivotal role in evaluating *Batson* claims." *Id.* The Court has explained that the demeanor of the prosecutor exercising a challenged strike is often "the best evidence of discriminatory intent." *Id.* (alterations omitted). The district court, unlike this court, observed the prosecutor's demeanor firsthand. Further, when the asserted basis for a strike is a prospective juror's behavior in court, the trial court will have observed and evaluated that juror's demeanor as well. *See id.* For those reasons, the Supreme Court has stated that "in the absence of exceptional circumstances, we would defer to the trial court" in resolving a *Batson* claim. *Id.* (alterations omitted); *see also Hernandez v. New York*, 500 U.S. 352, 365-66, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion).

Appellants argue that we should reject the district court's findings because the court itself did not individually discuss each challenged strike on the record. *Batson's* third step requires trial courts to closely analyze the prosecutor's proffered reason for each disputed strike in light of all the relevant circumstances. *See Miller-El*, 545 U.S. at 241-42, 251-52. The record here demonstrates that the district court appropriately exercised its *Batson* responsibilities. The district court required three rounds of argument on each strike of an African-American juror: a prosecution opening in which the government individually justified each strike; a defense response disputing those government explanations; and a prosecution reply to every defense argument. Throughout the hearing, the district court questioned counsel, reviewed its own notes, and corrected mistakes by counsel. The district court then concluded, based on the arguments and its personal observation of the prosecutors and of the prospective jurors' demeanor, that the government's race-neutral explanations were genuine. Appellants cite no controlling precedent requiring a trial court to render its decision in a strike-by-strike format. Given the obvious thoroughness of the district court's application of *Batson's* third step, we cannot conclude that the lack of strike-specific findings creates the sort of "exceptional circumstances" that would overcome our deference to the trial court. *Snyder*, 552 U.S. at 477.

Moreover, the circumstances of this case seriously undermine appellants' claim. Nine of the 12 jurors seated in this case were African-American. That jury composition mirrored the make-up of the venire, which contained 68 African-Americans out of 90 persons in the pool from which regular jurors were selected. Thus, while the prosecution used many strikes to remove prospective African-American jurors, that is largely explained by the fact that the jury pool was predominately African-American. In addition, the prosecutor's strikes did not skew the racial composition of the resulting jury. The circumstances here are a far cry from the facts of cases in which the Supreme Court has found a *Batson* violation. *Cf. Snyder*, 552 U.S. at 476 (all African-Americans in jury pool struck by prosecution); *Miller-El*, 545 U.S. at 240-41 (10 of 11 African-Americans in jury pool after dismissals for cause or by agreement struck by prosecution); *Batson*, 476 U.S. at 100 (all African-Americans in jury pool struck by prosecution).

Finally, in this case there are no extrinsic indicators of racial discrimination of the kind found in successful *Batson* challenges. For example, in *Miller-El*, a case in which the trial occurred before the 1986 *Batson* decision, the Court relied in part on the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries." *Miller-El*, 545 U.S. at 253. In contrast, the Supreme Court has explained that cases where the stricken jurors are the same race as the majority of victims and prosecution witnesses are unlikely candidates for a finding of racial discrimination. *See Hernandez*, 500 U.S. at 369-70 (plurality opinion). The overall facts and circumstances of this case thus do not support appellants' claim of intentional discrimination. *See Snyder*, 552 U.S. at 478 ("[I]n reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.").

## B.

Although the circumstances of this case strongly suggest that the prosecution did not use its peremptory strikes to discriminate on the basis of race, those facts alone are not dispositive. The dismissal of even a single prospective juror on the basis of race violates equal protection principles. *See Snyder*, 552 U.S. at 478. We therefore review each of the 11 strikes challenged by appellants. *Cf. Bond v. Beard*, 539 F.3d 256, 270 (3d Cir. 2008) (finding overall circumstances suggest no *Batson* violation, but nonetheless conducting analysis of each strike to resolve *Batson* claim).

Of the 11 strikes challenged on appeal, appellants objected to the following seven strikes in the district court. We review the district court's findings on those seven strikes for clear error. *Snyder*, 552 U.S. at 477. Because the district court empanelled an anonymous jury in this case, we identify each prospective juror using the numbers assigned by the district court.

2932: Among its concerns about this prospective juror, the prosecution noted 2932's statement that long delays in bringing criminal cases to trial impaired witnesses' memories. The prosecution worried that 2932 would be suspicious of the government's case because this case involved long delay and the government was relying on witnesses' memories of long-past events. Appellants do not rebut the plausibility of that specific, race-neutral objection or show that any other seated juror worried about the effect of delay on witnesses' memories.

3559: The prosecution explained that it struck 3559 on the basis of his youth. The government's statement that it struck every juror age 22 or younger, regardless of race, remains unrebutted.

3872: The prosecution stated that it struck 3872 for appearing disrespectful in court. Appellants cite trial transcripts in an attempt to demonstrate that seated white jurors *might* have behaved just as inappropriately. This is an instance in which "[a]ppellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision." *Rice v. Collins*, 546 U.S. 333, 343, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (Breyer, J., concurring); *see Snyder*, 552 U.S. at 483. We cannot tell from the record whether there was anything inappropriate about those seated jurors' demeanors. And contrary to appellants' assertion, *Snyder* does not establish a rule that trial courts must make specific findings about demeanor. *Cf. Thaler v. Haynes*, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010). Because appellants have not demonstrated any "exceptional circumstances" that require otherwise, we defer to the district court's finding on an issue that is "peculiarly within a trial judge's province." *Snyder*, 552 U.S. at 477.

**4463**: The prosecutor explained that 4463 appeared unstable in court and that "his voir dire indicated numerous answers that would make clear why the government opposes this juror." May 7, 2002 PM Tr. at 75. A quick review of 4463's rambling statements, in which he detailed how his brother had been unfairly framed for distribution of crack cocaine, makes clear why a prosecutor would want to strike 4463, regardless of race. Appellants' citation to a seated white juror whose family also had drug problems is not comparable. That juror calmly related the long-past problems of his relatives, and expressly stated that his brother had been dealt with fairly.

**4730**: The government claims to have struck 4730 in part because 4730 was suspicious of law enforcement and unsure that the death penalty should apply in Washington, D.C. Appellants question the strength of 4730's views on this subject, but they point to no seated juror who expressed reservations about law enforcement similar to 4730's concern about "rogue police officers," and a "bad experience" with law enforcement that "[l]eft a bad taste." Apr. 5, 2002 PM Tr. at 23-24. 4730's views on law enforcement provided a race-neutral explanation for the prosecution's decision to strike her.

5698: This prospective juror was a former special police officer whom the prosecutor claimed to have struck for being "quiet," "submissive," and possibly not "strong enough" to be an effective juror. May 7, 2002 PM Tr. at 42. To the extent we can discern demeanor from a written transcript, 5698's colloquy with the district court suggests a passive, uncertain, and quiet person. And passivity can be a plausible, race-neutral reason to exclude a juror. *See United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993). Appellants may be correct that former law enforcement officers are often desirable jurors from the prosecution's perspective. But that does not bar the prosecution from dismissing any particular juror because the government believes her personality would make her a less than desirable juror from the prosecution's perspective.

5773: The prosecution claimed to have struck 5773 due to 5773's concerns about imposing the death penalty. Appellants respond that seated white jurors appeared equally hostile to the death penalty. We disagree. As to the seated white juror whose views come closest to matching 5773's, he repeatedly followed questions about his ability to impose the death penalty with notations such as "I would try to abide by the Court's instruction, not my personal belief." By contrast, 5773's doubts about the death penalty were sufficiently salient that he used his questionnaire to indicate that he had concerns about his ability to be a fair juror. The prosecution thus had legitimate grounds to suspect that 5773 would be significantly more hesitant to impose the death penalty than the seated white juror.

In the district court the defense did not object to the prosecution's strike of the following four prospective jurors. The district court's rulings on these strikes are therefore reviewed only for plain error. *See, e.g., United States v. Charlton*, 600 F.3d 43, 50 (1st Cir. 2010).

**866**: The prosecution explained that it struck 866 because 866 "had a relative who had been convicted of murder." May 7, 2002 PM Tr. at 35. The record shows that 866's nephew, with whom she was personally close, murdered his wife and was then imprisoned, where 866 believes he was abused by his guards. Appellants' attempts to minimize the potential effect of 866's experiences with murder convictions and to draw comparisons to seated jurors who had relatives convicted of much less serious crimes are not convincing.

**2486**: The prosecution struck 2486 "based on things she said about her prior jury service . . . as well as other statements in her questionnaire." May 7, 2002 PM Tr. at 39. 2486's questionnaire and the transcript of what she said during *voir dire* refer to her participation in an acquittal during her prior jury service, which she attributed to the prosecution's lack of direct evidence. The record also demonstrates 2486's reticence to impose the death penalty and suspicion of law enforcement competence. Appellants now contend that the prosecutor's mere reference to 2486's statements and questionnaire responses is too vague to qualify as a credible, race-neutral explanation. But the prosecution had no reason to give a more detailed explanation, because appellants did not question this strike in the district court. Given that the record referenced by the prosecutor does in fact reflect an objective basis for the prosecutor's proffered explanation, we cannot say that the district court plainly erred in finding no racial motivation for this strike.

**3143**: The prosecution claims that it struck 3143 because 3143 demanded a higher standard of proof to impose the death penalty and was generally hostile to the death penalty. On appeal, appellants offer a lengthy comparison of 3143's views to those of seated white jurors. The government attempts — with considerable success — to distinguish the seated jurors' views from 3143's, but the government also has a more telling point: It is difficult to say that the district court plainly erred in not noticing similarities between those seated jurors and 3143, given that none of the six defendants' lawyers noticed those similarities during jury selection. We reject appellants' challenge to the prosecution strike of 3143.

**3505**: The prosecution explained its strike of 3505 based on 3505's statements in her questionnaire and during *voir dire* that the death penalty is "never justified." Appellants do not argue either that the prosecution's explanation is false or that other seated jurors had the same views. Appellants argue only that 3505 also claimed to be able to set her personal views aside. That in no way implies that the prosecutor considered race in striking 3505. This challenge could not succeed under any standard of review, much less under plain error review.

In short, appellants have failed to sufficiently undermine the government's race-neutral explanations for its peremptory strikes of prospective African-American jurors. Moreover, the circumstances of this case strongly suggest that the prosecution did not discriminate on the basis of race. Especially given the deferential standard under which we review challenges to the district court's decisions on this issue, we reject appellants' *Batson* claims.

## II.

A week before trial began, the government filed a motion requesting that the district court order appellants to wear stun belts during trial. Gray filed written opposition to the motion and, at a pretrial hearing five days later, all appellants opposed the motion orally. Feb. 27, 2002 PM Tr. at 36-52. The court granted the government's motion, *id.* at 57, and issued a memorandum opinion in support of its order, *see United States v. Gray*, 254 F. Supp. 2d 1 (D.D.C. 2002). Appellants contend that the district court violated their due process rights when it ordered them to wear stun belts at trial.

The right to a fair trial is a fundamental liberty secured by the due process guarantee of the Fifth and Fourteenth Amendments. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Invoking this fair trial right, the Supreme Court has stated that certain government practices during criminal trials prejudice defendants because they offend three "fundamental legal principles," *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005): (1) that "the criminal process presumes that the defendant is innocent until proved guilty," *id.*; (2) that "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel," *id.* at 631; and (3) that "judges must seek to maintain a judicial process that is a dignified process," *id.* When a government practice is prejudicial because it either inherently or in a particular defendant's case offends these principles, the Court has forbidden district courts from utilizing the practice unless it is justified by an essential state interest, such as courtroom security or escape prevention, specific to the defendant on trial. *See, e.g., Deck*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953; *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); *Estelle*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126.

Accordingly, the Supreme Court has held it is inherently prejudicial to require a criminal defendant to wear jail garb during trial and therefore, because no state interest is ever served by the practice, it violates his fair trial right. *See Estelle*, 425 U.S. at 505, 512-13. Similarly, the Court has held that visibly restraining a criminal defendant during either a criminal trial or the penalty phase of a capital prosecution is inherently prejudicial and thus is permissible only when justified by an essential state interest specific to the defendant. *See Deck*, 544 U.S. at 629. In contrast, the Court has held that deployment of security personnel in a courtroom is not inherently prejudicial, and is thus permissible, regardless of the state interest served, as long as it is not actually prejudicial in a particular case. *See Holbrook*, 475 U.S. at 568-69, 572.

Applying these lessons to the case before us, if the use of stun belts to restrain criminal defendants at trial either is inherently prejudicial or in this case was actually prejudicial to the defendants, the district court had the obligation to determine whether the belts were justified by an essential governmental interest specific to the defendants on trial. Appellants, who argue that stun belts are inherently prejudicial, contend that the district court failed to meet this obligation for three reasons. First, they assert that the district court failed to make an individualized determination of whether a stun belt was needed to restrain each defendant. Second, they argue that the district court was required but refused to hold an evidentiary hearing to resolve factual disputes they raised concerning the visibility of, necessity for, and alternatives to the stun belts. Finally, appellants maintain that the district court erroneously failed to consider how the stun belts would affect appellants' right to communicate with counsel and assist in their own defense. On review, we hold that, even assuming that stun belts are inherently or were actually prejudicial, the district court did all that was required of it.

In review of a district court's authorization of an inherently or actually prejudicial governmental practice, we find error only when the district court has abused its discretion. *See Deck*, 544 U.S. at 629 ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial."); *United States v. Wardell*, 591 F.3d 1279, 1293 (10th Cir. 2009); *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002).

It is true, as appellants say, that prior to authorizing the use of an inherently or actually prejudicial government practice, the district court must consider each defendant before him and determine whether the practice serves an essential interest in the particular trial at hand. *Deck*, 544 U.S. at 624, 633; *Holbrook*, 475 U.S. at 568-69. However, the district court did just this. In a memorandum opinion, the court carefully analyzed the following factors in its decision to require stun belts:

> 1) the seriousness of the crimes charged and the severity of the potential sentences; 2) the numerous allegations of threats of violence made by the defendants against witnesses; 3) previous guilty pleas or convictions of a substantial number of the defendants to prior gun charges and/or violent crimes; 4) allegations of gang activity, and the likelihood that associates or rivals of the alleged gang may be present at the trial; 5) the opinion of the U.S. Marshal for this District, particularly as it relates to knowledge of security in this courthouse and of cases of this nature; 6) potential prejudice to the defendants from the use of the stun belts; 7) likelihood of accidental activation of the stun belts; 8) potential danger to the defendants if the belts are activated; 9) the availability and viability of other means to ensure courtroom security; 10) the potential danger for the defendants and others present in the courtroom if other means are used to secure the courtroom; and 11) the existence of

> a clear written policy governing the activation of stun belts worn by defendants.

*Gray*, 254 F. Supp. 2d at 4. Finding that "[e]ach of the eleven factors" militated in favor of imposing stun belts, the district court concluded that the use of stun belts would "best preserve ... the security of the courtroom." *Id.* at 4-6.

The district court's memorandum opinion demonstrates that it considered the security concerns presented by the particular defendants at trial before making the determination that stun belts were appropriate. It thoroughly examined factors relevant to each defendant and, in the exercise of its broad discretion, made a determination based on those factors. That appellants shared many of the same characteristics (e.g., they were charged in the same conspiracy, they all faced either the death penalty or life sentences) does not mean the district court failed to consider them individually. And that the district court reached a result with which the defendants disagree does not mean it abused its discretion.

We also reject appellants' contention that the district court was obligated to hold an evidentiary hearing. When making the discretionary decision whether to authorize an inherently or actually prejudicial government practice at trial, "[a] formal evidentiary hearing may not be required, but if the factual basis for the extraordinary security is controverted, the taking of evidence and finding of facts may be necessary." *United States v. Theriault*, 531 F.2d 281, 285 (5th Cir. 1976); *cf. United States v. Law*, 528 F.3d 888, 903-04, 381 U.S. App. D.C. 270 (D.C. Cir. 2008);

*United States v. Microsoft Corp.*, 253 F.3d 34, 101, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (holding that district courts are not required to conduct evidentiary hearings prior to issuing relief in civil cases when "there are no disputed factual issues regarding the matter of relief"). Although the defense pointed out that due to the short notice of the hearing the evidence before the district court about how stun belts functioned was provided entirely by the government and there had "to be another side of the story with respect to the proffers that [the government has] made," appellants did not allege any specific inaccuracy or misrepresentation. Feb. 27, 2002 PM Tr. at 44-46. While appellants disputed the government's contention that other measures would be inadequate to secure the courtroom, *id.* at 49, this dispute is, in essence, the ultimate question the district court must answer. *See Durham*, 287 F.3d at 1304 ("[A] decision to apply leg shackles to the defendant 'must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.'" (quoting *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987) (per curiam))). Appellants must make a more specific factual challenge.

The only specific factual matter relevant to the district court's determination about which the government and appellants meaningfully disagreed was whether the stun belts would be visible. Feb. 27, 2002 PM Tr. at 38, 44, 56-57. However, in its memorandum opinion, the court accepted appellants' contention that there was *some* risk the stun belts would be visible. The court then specifically ordered precautions to reduce the visibility of the belts. The opinion states: "Although the Court does not believe that it is likely that any juror will see the stun belts, the Court will take precautions to minimize prejudice to the defendants. The defendants will be brought into the courtroom before the jury is brought in, and will be escorted from the courtroom after the jury has left." *Gray*, 254 F. Supp. 2d at 4. Under these circumstances, we hold that the district court acted within its discretion when it declined to hold an evidentiary hearing.

Turning to appellants' claim that the district court erred by not considering the effect of stun belts on appellants' ability to confer with their counsel and participate in their defense, we again find no error. As discussed above, whether wearing a stun belt affects a criminal defendant's ability to confer with counsel and participate in his defense is one of the three questions relevant to the determination of whether, before authorizing such a restraint, a district court must first determine whether it is justified by an essential governmental interest specific to the defendant on trial. When the district court made the appropriate findings to determine that the use of stun belts was so justified in appellants' case, the court implicitly assumed that the belts did risk negatively affecting appellants' abilities in this way. It was not required to revisit this question in its substantive decisionmaking process. We also note that while appellants direct us to case law that warns abstractly of the potential harm of stun belts, *see, e.g., Durham*, 287 F.3d at 1305-06, they have offered us no evidence stun belts in any way affected their communication with their counsel or their participation in their defense.

Moore also repackages appellants' arguments that the district court abused its discretion by authorizing stun belts into an objection to the court's refusal to grant his post-trial motion for a new trial. Before the district court Moore argued that he was entitled to a new trial because "a sufficient factual predicate did not exist" to justify the district court's authorization of stun belts. Def. Moore's Mot. for New Trial at 2 (June 8, 2003). He also maintained that a new trial was warranted because his stun belt was activated, outside the presence of the jury. On appeal, Moore argues that he was physically and psychologically injured by the activation of the stun belt and that these injuries interfered with his ability to communicate with his attorney and assist in his own defense.

Moore's stun belt was activated on November 12, 2002, while trial was ongoing but before trial had started on that day. Nov. 12, 2002 AM Trial Tr. at 8. Defense counsel reported the incident to the court and asked the court to consider taking a break. *Id.* at 97. The court did so and, after reconvening, announced that it had asked a nurse to examine Moore and that the nurse had reported that Moore "fe[lt] that the use of the device was unjustified," but that he was "physically ... all right" and "was willing to go forward today." *Id.* at 98. Moore's counsel did not challenge these representations or otherwise object further. *Id.*

We reject Moore's claims. That Moore's stun belt was activated does not undermine the district court's reasoned decision, which we have upheld, to require him to wear a stun belt. Insofar as Moore now claims that the district court violated his constitutional rights not by requiring him to wear the belt but by continuing the trial after the belt's activation, we again find no error. As noted, the district court acceded to the request for a break by Moore's counsel, who never disputed the representation by the nurse, who had examined Moore, that Moore was ready to proceed with the trial.

## III.

Appellants contend that the district court erred in empaneling an anonymous jury insofar as the prospective jurors' names, addresses, and places of employment were withheld. Our review is for abuse of discretion, despite appellants' contention that the *de novo* standard applies because "constitutional principles are involved." Appellants' Br. at 73. The court rejected this view in *United States v. Childress*, 58 F.3d 693, 313 U.S. App. D.C. 133 (D.C. Cir. 1995), a case concerning (in part) whether "the use of anonymous juries violates the *Constitution*," *id.* at 702 (emphasis added), because "[d]ecisions on ... anonymity require a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings," *id.*

In *United States v. Edmond*, 52 F.3d 1080, 311 U.S. App. D.C. 235 (D.C. Cir. 1995), the court advised that "[i]n general, the [district] court should not order the empaneling of an anonymous jury without (a) concluding that there is a strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." *Id.* at 1090 (first alteration in original) (citation and quotation marks omitted). In determining whether such protection is warranted, the court has found its analysis aided by five factors identified by the Eleventh Circuit:

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

*Id.* at 1091 (quoting *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994)). Finding that all five factors were satisfied here, the district court granted the government's motion for an anonymous jury. As justification, the district court noted that appellants were charged in the superseding indictment with participating in a drug and RICO conspiracy that involved multiple acts of violence using firearms, in addition to threatening potential witnesses and preventing individuals from cooperating with law enforcement, and that if convicted appellants faced the maximum penalty of death or life imprisonment.

Pointing to two *Washington Post* articles, the district court noted that this case had garnered media attention capable of increasing the potential danger to jurors. *See United States v. Gray*, No. 00-cr-157, at 12-13 (D.D.C. Feb. 7, 2002) (resolving pretrial motions).

Appellants challenge the district court's decision to empanel an anonymous jury on three grounds. None is persuasive. First, appellants maintain that the district court's decision was unfounded because the superseding indictment did not allege any history of juror intimidation. This argument misunderstands and too narrowly construes the requirements set forth in *Edmond*. As the court explained, "we do not believe such evidence [of jury tampering] is necessary in every case. Rather, we think the District Court ... reasonably could have ascertained a threat to jurors from the charges in the indictment." *Edmond*, 52 F.3d at 1091. Here, the particular allegations of "multiple acts of violence to prevent individuals from contacting law enforcement," *Gray*, No. 00-cr-157, at 13 (Feb. 7, 2002), were sufficient, viewed in context, for the district court to be concerned about appellants' capacity to harm jurors and interfere with the judicial process. *See Edmond*, 52 F.3d at 1091-92. As support, the district court cited the factual findings set forth in its November 15, 2001 memorandum regarding appellants' history of interfering with the judicial process, in resolving various discovery and evidentiary disclosure requests. *See United States v. Gray*, No. 00-cr-157, at 5-12 (D.D.C. Nov. 15, 2001).

Second, appellants maintain that media interest in this criminal prosecution would not endanger jurors' safety.

The district court identified two *Washington Post* articles covering appellants' case as a prosecution brought against "Murder, Inc." Both articles appeared on the front page of the Metro section and described the number of alleged murders as historic and unprecedented. Such evidence of "initial media interest," *United States v. Wilson*, 160 F.3d 732, 746, 333 U.S. App. D.C. 103 (D.C. Cir. 1998), in a high-profile prosecution of a major drug conspiracy involving multiple defendants over a substantial period of time and alleged purposeful and random acts of murder supports the district court's decision.

Third, appellants suggest that the district court failed to take reasonable precautions to minimize any potential prejudice to them as a consequence of juror anonymity. In granting the motion for an anonymous jury, the district court advised that it would "use a questionnaire and extensive voir dire to examine the jurors' backgrounds" and, in addition to instructing jurors that appellants were presumed innocent until proven guilty, "provide a neutral explanation to the jurors regarding their anonymity." *Gray*, No. 00-cr-157, at 13 (Feb. 7, 2002). These precautions were, in fact, taken. A combination of instructions downplaying the significance of jurors' anonymity and a lengthy *voir dire* questionnaire can adequately safeguard a defendant's fundamental rights. *See, e.g., Childress*, 58 F.3d at 701-02; *Edmond*, 52 F.3d at 1092-93. Here the neutral instruction, set forth in the jury questionnaire,[4] informed jurors that they would meet at specific locations to be escorted to and from the courthouse "for [their] convenience as well as to assure both the government and the defense that no one has attempted to contact, communicate, or influence the jury." For *voir dire*, the 46-page jury questionnaire — at least double the length of the jury questionnaires that passed muster in *Childress* and *Edmond* — provided appellants with "a broad variety of personal information, including the quadrant of the city in which jurors resided, their educational history, marital status, military service, employment status and work description, their spouse's and children's employment, and their experience with crime, drugs, and law enforcement." *Edmond*, 52 F.3d at 1092. This sufficed "to compensate for the information denied by juror anonymity" because "[i]t elicited information ... far more extensive and detailed than the generalizations appellants might have drawn from jurors' mere names and addresses." *Id.* Appellants have pointed to no particular example of prejudice.

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[4] Although appellants note in the "background" section of their brief that the district court's instruction was not given orally or repeated during the trial, appellants do not pursue this issue in their argument section. We therefore have no occasion to consider

Accordingly, we hold that the district court, having made the necessary findings under the *Edmond* factors, did not abuse its discretion in granting the government's motion for an anonymous jury.

## IV.

Appellants raise numerous claims of prosecutorial misconduct, including inflaming the passions and

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whether a written instruction that is not orally repeated thereafter would alone be an adequate safeguard. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001, 382 U.S. App. D.C. 78 (D.C. Cir. 2008); Fed. R. App. P. 28(a)(9).

prejudices of the jury, vouching for and bolstering the credibility of witnesses, soliciting testimony to that effect, denying appellants a presumption of innocence through elicitation of improper opinion testimony, and violating appellants' Sixth Amendment right by introducing evidence that they associated with and often sought the advice of legal counsel.[5] We have reviewed these claims and limit our discussion to those having arguable merit, and concluded that even when appellants' claims are viewed cumulatively, they fail to show a violation of their due process rights as would entitle them to a new trial.

### A.[6]

*Opening and Closing Arguments.* Appellants contend that the prosecutor's opening argument to the jury was improper and substantially prejudiced the trial proceedings by interfering with the jury's ability to properly assess the evidence. Our review of allegedly improper prosecutorial arguments is for substantial prejudice where the defendants lodged an objection, but we apply the plain error standard where they failed to object. *See United States v. Small*, 74 F.3d 1276, 1281, 316 U.S. App. D.C. 15 (D.C. Cir. 1996); *see also United States v. Catlett*, 97 F.3d 565, 573, 321 U.S. App. D.C. 108 (D.C. Cir. 1996). When, as here, the alleged prosecutorial misconduct forms the basis for an unsuccessful motion for a mistrial, our review of the district court's denial of that motion is for abuse of discretion. *See Small*, 74 F.3d at 1284. This court has identified three factors that guide the determination whether improper remarks in closing and opening statements prejudiced a defendant so as to warrant reversal, under either the substantial prejudice or plain error standard: "(1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the error's effects." *United States v. Becton*, 601 F.3d 588, 598, 390 U.S. App. D.C. 167 (D.C. Cir. 2010); *see also United States v. Gartmon*, 146 F.3d 1015, 1026, 331 U.S. App. D.C. 74 (D.C. Cir. 1998). In addition, this court will presume "that a jury acts with common sense and discrimination when confronted with an improper remark from a prosecutor and owes deference to the district court's assessment of such a statement's prejudicial impact on the jury." *United States v. Childress*, 58 F.3d 693, 716, 313 U.S. App. D.C. 133 (D.C. Cir. 1995) (citation and internal quotation marks omitted).

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[5] Appellants also incorporate their arguments relating to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and the federal bribery statute, 18 U.S.C. § 201(c)(2), which are addressed in Parts VI and XII, respectively.

[6] Circuit Judge Kavanaugh does not join Parts IV.A.1 and IV.A.2.

The Supreme Court has described the federal prosecutor as occupying a position of public trust:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the

> servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *accord Taylor v. United States*, 413 F.2d 1095, 134 U.S. App. D.C. 188 (D.C. Cir. 1969). It follows from this rigorous standard that, in making opening and closing arguments, a prosecutor has an obligation "to avoid making statements of fact to the jury not supported by proper evidence introduced during trial," even when the misstatements are made in good faith. *Gaither*, 413 F.2d at 1079. Equally well settled, "[a] prosecutor may not make comments designed to inflame the passions or prejudices of the jury." *United States v. Johnson*, 231 F.3d 43, 47, 343 U.S. App. D.C. 409 (D.C. Cir. 2000); *see Childress*, 58 F.3d at 715. These general principles apply to, and inform the particular function of, the government's opening and closing arguments in a criminal trial.

1. "The purpose of an opening statement is to provid[e] background on objective facts while avoiding prejudicial references," and hence "[t]he prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to

poison the jury's mind against the defendant or to recite items of highly questionable evidence." *United States v. Thomas*, 114 F.3d 228, 247, 324 U.S. App. D.C. 374 (D.C. Cir. 1997) (alterations in original) (citations and internal quotation marks omitted). So understood, prosecutorial misconduct exists where the government's argument touches upon facts prejudicial to the defendant that the government fails to support by admissible evidence at trial. *See Small*, 74 F.3d at 1283. On the other hand, a prosecutor's reference in opening argument to the defendants as "two armed gunmen driving through the streets of D.C., armed to the teeth, dressed for action, carrying a load of dope," although strong and vivid, was not prosecutorial misconduct because the statement was supported by ample evidence introduced at trial. *United States v. Moore*, 104 F.3d 377, 390, 322 U.S. App. D.C. 334 (D.C. Cir. 1997).

The prosecutor's opening argument appears to have improperly departed from the standard in *Berger* and applied to opening arguments by this court. As in *Small*, 74 F.3d at 1283, it appears "the prosecutor came close to the line . . . in several instances and crossed it in others." For example, appellants were charged with committing 31 murders, and the prosecutor's repeated use of the word "execute" at the start of the trial seems to run afoul of the concern expressed by the court in *United States v. Jones*, 482 F.2d 747, 753, 157 U.S. App. D.C. 158 (D.C. Cir. 1973), in stating the court could "not condone" the prosecutor's reference during closing argument to the defendant as an "executioner." More generally, the opening argument includes a number of instances where the prosecutor went beyond merely providing an "objective summary of the evidence." *Thomas*, 114 F.3d at 248 (citation and quotation marks omitted). Such statements referring to the murdered victims as "[w]here there once was face and life, now there is nothing but empty black space. . . . Where there once was life, now there's death," May 9, 2002 PM Trial Tr. at 113, are neither based on evidence nor free from innuendo. Rather, they attempt to appeal to the jury's emotions by dramatic effect. *See Childress*, 58 F.3d at 715. Although other statements listing the 31 murder victims by names and dates on which they were killed are grounded in admissible evidence that the government intended to introduce at trial, this evidentiary nexus became tenuous once the prosecutor began discussing the victims' first days of school, favorite songs, families, mothers, fathers, coffins, and funerals. *Cf. United States v. Dominguez*, 835 F.2d 694, 700 (7th Cir. 1987). Indeed, the district court recognized that although the prosecutor's opening argument "was fairly factually stated" it contained "some hyperbole," May 9, 2002 PM Trial Tr. at 127, a disfavored technique, *see United States v. North*, 910 F.2d 843, 895, 285 U.S. App. D.C. 343 (D.C. Cir. 1990); *United States v. Bouck*, 877 F.2d 828, 831 (10th Cir. 1989); *Dominguez*, 835 F.2d at 701.[7] Although the government is not required to make its opening argument in a rote manner, the court has admonished that "an opening statement to the jury should be carefully phrased to avoid overstatement." *Thomas*, 114 F.3d at 248. It is the government's opportunity to present the jury with argument based "on *objective* facts *while avoiding prejudicial references*." *Id.* at 247 (emphases added) (citation and quotation marks omitted).

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[7] At the conclusion of the prosecutor's opening statement, the district court *sua sponte* instructed the jury, as it had at the outset of the trial, that

> the statements of the lawyers aren't evidence. They're intended to help you follow the evidence when the evidence is introduced. The defendants deny these charges, and you should keep an open mind until after you've heard all the evidence and I give you my final instructions on the law.

2. "The sole purpose of closing argument is to assist the jury in analyzing the evidence," and hence courts have recognized that the prosecutor (as well as defense counsel) is afforded some leeway in "stat[ing] conclusions drawn from the evidence," *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997) (citation and quotation marks omitted); *see also Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); 6 Wayne R. LaFave et al., Criminal Procedure § 24.7(b) (3d ed. 2007). "[I]n closing argument counsel may not refer to, or rely upon, evidence unless the trial court has admitted it." *United States v. Maddox*, 156 F.3d 1280, 1282, 332 U.S. App. D.C. 252 (D.C. Cir. 1998); *see also Small*, 74 F.3d at 1280. But the prosecutor may, for instance, draw inferences from evidence that support the government's theory of the case so long as the prosecutor does not intentionally misrepresent the evidence. *See United States v. Deloach*, 530 F.2d 990, 1000, 174 U.S. App. D.C. 138 (D.C. Cir. 1975).

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May 9, 2002 PM Trial Tr. at 114 (paragraph break omitted). The district court then denied appellants' oral motions for a mistrial. It explained that the jury instruction "takes care of any other problems" and that it "didn't find the opening to be inflammatory in the sense that defense counsel saw it . . . but, rather, was fairly factually stated with some hyperbole." *Id.* at 127.

Indeed, the prosecutor "may strike hard blows," but not "foul ones." *Berger*, 295 U.S. at 88. Because the line between permissible and impermissible arguments will not always be clear, the inquiry is necessarily contextual. *See Catlett*, 97 F.3d at 572; *Deloach*, 530 F.2d at 999-1000.

Some statements by the prosecutor during closing argument appear problematic. Illustrative is the prosecutor's invitation for the jurors to "imagine Scott Downing," one of the murder victims, in "the last few minutes of [his] life." The prosecutor told the jury:

> Scott Downing is bound with duct tape. It's pitch black in the back of that U-haul. He does not know what's going to happen to him. He must — he must wonder if he's going to live through this night. . . . He's taken out of that U-haul. He tries to talk but he can't. All he can do is mumble. He feels the grass under his body. He feels the gravel of the road. . . . And then a gun is placed to the back of his head and two bullets.

Nov. 21, 2002 AM Trial Tr. at 112-13. On appeal, the government responds, in a footnote, that this narrative "had sympathetic overtones" only "[a]t a superficial level" because the jury heard evidence that Downing had been kidnapped, bound and gagged, and shot by the side of the road. Appellee's Br. at 96 n.68. This response, however, misses the fundamental distinction between permissible and impermissible closing arguments. In summarizing evidence supporting conviction, a prosecutor may not take artistic license with the trial evidence, construct a more dramatic version of the events, provide conjecture about a victim's state of mind, and then defend against a prosecutorial misconduct claim by maintaining the statements are "fact-based." Sensationalization, loosely drawn from facts presented during the trial, is still a "statement[] of fact to the jury not supported by proper evidence introduced during trial," *Gaither*, 413 F.2d at 1079, clearly "designed to inflame the passions or prejudices of the jury," *Johnson*, 231 F.3d at 47. Although not as egregious as comparing appellants to Hitler, as occurred in *North*, 910 F.2d at 895, there are, as every prosecutor knows, limits to striking "hard blows," *Berger*, 295 U.S. at 88.

3. Nonetheless, assuming, as appellants contend, that prosecutorial misconduct occurred during the arguments to the jury, it did not substantially prejudice appellants. Although the specific arguments to which appellants object appeared at times to address central issues in the case, there was overwhelming evidence of appellants' guilt of the crimes implicated by the prosecutor's purported misconduct, and the district court gave general limiting instructions on the arguments of counsel to the jury at the beginning of the trial, after the prosecutor's opening argument, and during the final instructions to the jury before it began deliberating. *See Thomas*, 114 F.3d at 249; *Gaither*, 413 F.2d at 1079.

Appellants' reliance on *United States v. Moore*, 375 F.3d 259 (3d Cir. 2004), is misplaced. In that case the prosecutor's closing argument compared the defendant to a 9/11 "terrorist" on the eve of the first anniversary of those events and referenced irrelevant evidence that the defendant was forcing children to sell drugs. Reversal of the convictions, however, was based on the fact that "[i]nadmissible evidence and highly inflammatory statements came rolling in unimpeded" throughout the trial in such a pervasive manner as to undermine the soundness of the jury verdict. *Id.* at 263-65. This court applies a similar standard to the prejudice inquiry: "[A]bsent 'consistent and repeated misrepresentation' to influence a jury, '[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions'" of severe misconduct; by contrast, "tainted closing arguments that follow on the heels of improper and indecorous prosecutorial conduct during trial are more likely to amount to the type of severe misconduct that justifies reversing a conviction." *North*, 910 F.2d at 897 (second alteration in original) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). But unlike in the Third Circuit case, that standard is not met in the instant case.

Here, the severity of what appellants have identified on appeal as misconduct was limited to relatively small portions of lengthy opening and closing arguments. *See United States v. Monaghan*, 741 F.2d 1434, 1443, 239 U.S. App. D.C. 275 (D.C. Cir. 1984). As this court has observed on occasion, "the length of time between the prosecutor's opening statement and jury deliberations" — seven months in the instant case — "makes it unlikely that specific allegations in the opening profoundly influenced those deliberations." *United States v. Williams-Davis*, 90 F.3d 490, 508, 319 U.S. App. D.C. 267 (D.C. Cir. 1996). Moreover, the district court repeated its general limiting instruction that the statements of counsel are not evidence at the outset of the trial and following the prosecutor's opening argument, May 9, 2002 PM Trial Tr. at 114, and again after closing arguments in giving final instructions to the jury, *see* Dec. 9, 2002 AM Trial Tr. at 72. This is usually a strong ameliorative consideration for prosecutorial misconduct during opening, *see Thomas*, 114 F.3d at 249, and closing argument, *Childress*, 58 F.3d at 716; *North*, 910 F.2d at 897; *United States v. Hawkins*, 595 F.2d 751, 754-55, 193 U.S. App. D.C. 366 (D.C. Cir. 1978). Although the type of general instruction given here is not a guarantee for the government as necessarily mitigating the prejudicial effects of prosecutorial misconduct in arguments, *see North*, 910 F.2d at 897 n.33, this is not a "particularly egregious case[]" that would require additional cautionary and limiting instructions, and the defense did not request them, *Thomas*, 114 F.3d at 249 (citation and quotation marks omitted). Under the circumstances, we conclude, assuming prosecutorial misconduct during opening and closing arguments to the jury, that the misconduct did not impermissibly and prejudicially interfere with the jury's ability to assess the evidence.

## B.

*Overview Witness.* More problematic is the government's use of a Federal Bureau of Investigation ("FBI") agent as an overview witness. FBI Agent Daniel Sparks testified as the first witness in the government's case-in-chief. His testimony provided an overview of the government's case, setting forth for the jury the script of the testimony and evidence the jury could expect the government to present in its case-in-chief. Further, he expressed his opinion, based on his training and experience, about the nature of the investigation conducted in this case.

Appellants contend that the use of an overview witness as the government's first witness improperly permitted the government, over defense objections, to elicit FBI Agent Sparks's opinions about the charged crimes, the reasons for appellants' actions in various circumstances, the nature of the charged conspiracy and the relationships between coconspirators, including the cooperating co-conspirators who testified as government witnesses, and the strength of the evidence — all before the government had presented any such evidence. Appellants suggest that FBI Agent Sparks's testimony left the impression for the jury that it should accept that the co-conspirator cooperating witnesses would fully and truthfully recount the events and impressions that he outlined in his testimony. Hence, the question is whether such overview testimony is permissible, and even if permissible with respect to the FBI agent's description of aspects of the pre-indictment investigation of which he had personal knowledge, whether the overview witness's testimony here caused substantial prejudice to appellants. Our conclusions are not affected by whether appellants' challenge is viewed as a question of prosecutorial misconduct, as appellants contend, or a claim of abuse of discretion by the district court in admitting inadmissible evidence, *United States v. Watson*, 409 F.3d 458, 462, 366 U.S. App. D.C. 188 (D.C. Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34, 101, 346 U.S. App. D.C. 330 (D.C. Cir. 2001).

Until recently this court had not addressed the appropriateness of a government overview witness at the outset of its case, but had identified the "obvious dangers posed by summarization of evidence" by a non-expert witness called by the government during its case-in-chief in *United States v. Lemire*, 720 F.2d 1327, 1348, 232 U.S. App. D.C. 100 (D.C. Cir. 1983). The analysis in *Lemire* is instructive. In that case, the government called toward the end of its case-in-chief an FBI agent, who was also a certified public accountant, "to summarize the evidence about the complex cash flow through offshore companies" in a prosecution for wire fraud, interstate transportation of proceeds of fraud, and conspiracy. *Id.* at 1346. The FBI agent "used four summary charts to reexamine th[e] evidence" already presented by the government "in a more organized fashion," and "prefaced each piece of his testimony by identifying the document in evidence from which he obtained the information." *Id.* Upon defense objection that the FBI agent was an improper witness under Federal Rule of Evidence 602,[8] the district court conducted a "full voir dire examination" before allowing the FBI agent to testify, "subject to limiting instructions that his testimony was explanatory and was not itself substantive evidence." *Id.* at 1346-47.

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[8] At the time, Rule 602 of the Federal Rules of Evidence provided, as relevant, that "'[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.'" *Lemire*, 720 F.2d at 1347 n.30 (quoting Fed. R. Evid. 602). Subsequent amendments were technical in nature. *See* Fed. R. Evid. 602 advisory committee's note.

On appeal, this court held that the district court did not abuse its discretion in permitting the government to use a non-expert summary witness because

> neither Rule 602's literal language nor its overriding purpose was violated. [The FBI agent] did not testify about any of the events underlying the trial: he only summarized evidence about cash flows that several prior witnesses had already offered. As to that evidence, he testified from his personal knowledge of the transcripts and exhibits.

*Id.* at 1347. The court also noted that other courts had "permitted such summaries under Rule 1006, allowing for admission into evidence of summaries of documents too voluminous to be conveniently examined in court" even if the documents were already in evidence. *Id.*[9] That rule aside, the court observed that "[t]here is an established tradition that permits a summary of evidence to be put before the jury with proper limiting instructions." *Id.* (citations and quotation marks omitted). Nonetheless, this court concluded that the claim of unfair prejudice "raises more troubling concerns." *Id.* at 1347-48. Initially the court noted that the non-expert summary evidence was cumulative and subject to challenge under Rule 403 as more unfairly prejudicial than probative. *Id.* at 1348. It also acknowledged that a non-expert summary witness "can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." *Id.* But the court pointed to three "obvious dangers posed by summarization of evidence." *Id.*

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[9] Rule 1006 of the Federal Rules of Evidence provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

First, the jury might treat the summary evidence as additional or corroborative evidence that unfairly strengthens the government's case. The court was satisfied that for a summary witness there were adequate safeguards, including cross-examination and limiting instructions, that could be fashioned by the district court to prevent the jury from treating the summary evidence as substantive proof. The court emphasized that the defendant's challenge to the personal knowledge of the summary witness was not an issue because the witness "had carefully reviewed the charts and ensured that they reflected information contained in documents *already in evidence*." *Id.* at 1349 (emphasis added); *see also United States v. Kayode*, 254 F.3d 204, 212, 349 U.S. App. D.C. 127 (D.C. Cir. 2001).

Second, summary witness testimony posed the risk that otherwise inadmissible evidence might be introduced. This concern was ameliorated, the court concluded, because "the judge, prosecutor and defense counsel all heard the evidence upon which [the witness] based his summary" and hence "he was unlikely to stray from that evidentiary base without quickly being stopped." *Lemire*, 720 F.2d at 1349 n.33. Indeed, the court noted, "at one point the witness inadvertently started to discuss material not in evidence, and the prosecutor prevented him from doing so." *Id.*

Third, a summary witness might permit the government to have an extra closing argument. The court noted, however, that the summary witness had made no "controversial inferences or pronounced judgment" and thus the district court had no need to interfere with the examination on this ground. *See id.* at 1349-50.

Other circuits to address the use of overview witnesses have reached uniformly negative conclusions in view of the serious dangers of prejudice to a fair trial. The Court of Appeals for the First, Second, and Fifth Circuits have held that the use of overview testimony by the government is a "troubling development" for this very reason. *United States v. Casas*, 356 F.3d 104, 120 (1st Cir. 2004); *see also United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003). As the First Circuit explained in describing the practice as "inherently problematic":

> [S]uch testimony raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence. There is also the possibility that later testimony might be different than what the overview witness assumed; objections could be sustained or the

> witness could change his or her story. Overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government.

*Casas*, 356 F.3d at 119-20 (internal citation omitted).

Approaching the question from a different perspective, the Second Circuit prohibited overview witnesses from giving lay opinions about anticipated evidence without satisfying the three requirements of Federal Rule of Evidence 701 — that the witness's testimony (1) be based on his personal perception, (2) be helpful to the jury, and (3) not be based on scientific, technical, or other specialized knowledge. *See Garcia*, 413 F.3d at 211-17. As regards the second factor, the Second Circuit dismissed the notion that an overview witness aided the jury by framing how the government's case-in-chief will unfold, observing that "[t]he law already provides an adequate vehicle for the government to 'help' the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant's culpability: the opening statement." *Id.* at 214. To the extent the summary witness testified to the ultimate question of fact, the Second Circuit noted that "courts should be wary of opinion testimony whose 'sole function is to answer the same question that the trier of fact is to consider in its deliberations,'" *id.* at 210 (quoting 4 Weinstein's Federal Evidence § 701.05 (2d ed. 2004), and citing Fed. R. Evid. 704 advisory committee's notes to 1972 proposed rules), observing that it had previously held in two other cases that it was "error to allow law enforcement witnesses to express opinions as to [the] defendants' culpability based on the totality of information gathered in the course of their investigations," *id.* at 211 (citing *United States v. Grinage*, 390 F.3d 746, 749-51 (2d Cir. 2004); *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003)). The court held that "the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion . . . based [on investigative work] and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience." *Id.* at 216.

This court recently observed that the First, Second, and Fifth Circuits "have viewed agents' hearsay-laden or hearsay-based overview testimony at the onset of trial as a rather blatant prosecutorial attempt to circumvent hearsay rules." *United States v. Smith*, 640 F.3d 358, 367, 395 U.S. App. D.C. 95 (D.C. Cir. 2011) (citations omitted). In *Smith*, the defendant was charged with drug and firearm offenses. An FBI agent testified at the start of the trial that Smith and a co-conspirator "were working together putting their money together and going to New York to buy heroin." *Id.* at 366. On appeal, Smith contended that the overview testimony — the single sentence — was based on inadmissible hearsay and thus violated Federal Rules of Evidence ("FRE") 701 and 802. Assuming the same prohibition against inadmissible hearsay testimony by an overview witness applied as in the other circuits, the court concluded that the FBI agent's objected-to single-sentence testimony was not based on otherwise inadmissible hearsay because the underlying statements were either admissions of a party-opponent or co-conspirator statements under FRE 801(d)(2), *see id.* at 367-68, and if error, was harmless, *see id.* at 368. The court reached the same ultimate conclusion with respect to the agent's lay opinion testimony about the meaning of slang used by Smith and his co-conspirators during recorded conversations; although the lay opinion testimony was inadmissible under FRE 701 because it was based on specialized knowledge gained from working on other drug investigations, *id.* at 365 (citing *United States v. Wilson*, 605 F.3d. 985, 1026, 390 U.S. App. D.C. 368 (D.C. Cir. 2010)), the error was harmless because the agent would have qualified as an expert under FRE 702 and offered the same testimony, *id.* at 366.

The district court is ordinarily afforded broad discretion to determine the manner in which evidence will be received. *See Huddleston v. United States*, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). But in *Lemire*, this court concluded that "the pervasiveness of the[] dangers [it had identified with summarization of evidence] requires that we review the use of a summary witness closely." 720 F.2d at 1348. Indeed, it was only "under appropriate circumstances with appropriate instructions" that this court "in the past approved the use of summary witnesses . . . in jury trials." *Microsoft Corp.*, 253 F.3d at 101. We accordingly review FBI Agent Sparks's overview testimony closely, aware that there was no *voir dire* before his testimony and a limiting instruction was given to the jury only after he completed his testimony, and then only with regard to opinions, not otherwise described, that he may have offered while testifying.

All three dangers identified by this court in *Lemire* are evident from the record in this case: FBI Agent Sparks testified about evidence not yet presented while opining that the cooperating witnesses would present truthful evidence because they were insiders and were guilty themselves, strengthening the government's yet-to-be presented case and offering inadmissible evidence while providing the government with a second opening argument. For example, upon being shown a map of the District of Columbia, FBI Agent Sparks confirmed that the 31 circles located on the map accurately reflected the locations of the 31 charged murders, and that murders clustered in certain locations occurred toward the beginning of the charged conspiracy. *See* May 15, 2002 AM Trial Tr. at 68-69. But no such evidence was before the jury and FBI Agent Sparks did not purport to testify from personal knowledge of each murder. At other points, FBI Agent Sparks referred to witness testimony that was never presented to the jury during the course of the trial. In one exemplary circumstance, FBI Agent Sparks testified on redirect examination that co-conspirator Erskine Hartwell had described his role in the conspiracy as supplying drugs and introducing Moore and Gray to Oscar Veal. *See* May 16, 2002 AM Trial Tr. at 56. When asked by the district court whether this information was "based on what [Hartwell] told [him]," FBI Agent Sparks agreed, prompting the district court to state: "The jury is going to hear his testimony." *Id.* at 57. Yet when asked only moments later by the prosecutor "if Erskine Hartwell will be a witness in this case or not," FBI Agent Sparks replied that he "d[idn't] know for sure if [Hartwell] will." *Id.* at 59. From portions of the transcript submitted by the parties to this court, there is no indication that Hartwell testified at trial and hence "later testimony . . . differe[d] [from] what the overview witness assumed." *Casas*, 356 F.3d at 119-20. The prosecutor thus impermissibly invited the jury to "rely upon the alleged facts in the [overview] as if [those] facts had already been proved." *Griffin*, 324 F.3d at 349 (alterations in original) (citation and internal quotation marks omitted).[10]

Likewise, FBI Agent Sparks impermissibly commented on the strength of the government's yet-to-be introduced evidence, vouched for the credibility of witnesses the government intended to call at trial, and gave his personal opinion as to guilt or innocence. Weighing trial evidence and making "[d]eterminations of credibility are for the jury," *United States v. Boyd*, 54 F.3d 868, 871, 312 U.S. App. D.C. 35 (D.C. Cir. 1995) (citation and quotation marks omitted); *see also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), as is "draw[ing] the ultimate conclusion of guilt or innocence," *United States v. Gaudin*, 515 U.S. 506, 514, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *see also Garcia*, 413 F.3d at 210-11; *United States v. Peterson*, 483 F.2d 1222, 1238, 157 U.S. App. D.C. 219 (D.C. Cir. 1973). FBI Agent Sparks's testimony crossed the line in a number of instances. For example, he testified that it was important, in his view, to use cooperating witnesses in this case because it was "the only way" to gain "access to the inside information." May 15, 2002 AM Trial Tr.

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[10] Other co-conspirator cooperating witnesses testified to Hartwell's role in the conspiracy. *See, e.g.*, May 20, 2002 PM Trial Tr. at 139; Aug. 26, 2002 PM Trial Tr. at 113-16.

at 25. Acknowledging that cooperating witnesses were "themselves ... criminals[,] unfortunately," he further testified that the cooperating co-conspirator witnesses nonetheless

> know what's going on, they have the information, they're the eyewitnesses, ear-witnesses, they hear what these guys are talking about after they commit a murder, they witness a murder, they know where the stash locations are for drugs.... [T]hey are present when drug deals are done. They have been with these people day in and day out, and you need that kind of testimony. That's the only way to put these kind[s] of cases together.

*Id.* He also testified that the goal in a debriefing session was to "[g]et [] complete and truthful information" and that it was important to "try and verify" the information "[j]ust to make sure the person is truthful, that they are complete." *Id.* at 15, 16. On redirect examination, FBI Agent Sparks reinforced the notion that the cooperating witnesses were guilty of committing crimes in their capacity as the defendants' coconspirators:

> Q: You were asked a lot of questions on cross-examination about cooperating witnesses, and you continually referred to them as criminals.
>
> A: Yes.
>
> Q: Any doubt in your mind about that?

A: None whatsoever.

May 16, 2002 AM Trial Tr. at 59.

All of this was opinion testimony that went far beyond "constructing the sequence of events in the investigation . . . to provide background information and to explain how and why the agents even came to be involved with [a] particular defendant." *United States v. Flores-de-Jesús*, 569 F.3d 8, 19 (1st Cir. 2009) (citations and internal quotation marks omitted). Instead, these statements suggested both directly and indirectly to the jury that an experienced and highly trained FBI agent had determined that the cooperating coconspirators who would testify at trial were to be treated as credible witnesses and that appellants were guilty of the charged crimes. The clear implication was that the government had selected only truthful co-conspirator witnesses for the pre-indictment investigation, from whom the jury would hear during the trial.

In sum, FBI Agent Sparks's testimony was improper in offering his non-expert opinions about the charged conspiracy and appellants, vouching for the reliability of the investigation and of the cooperating co-conspirator witnesses the government planned to have testify at trial, and discussing evidence that had yet to be introduced. Given the dearth of taped conversations and videotaped evidence — none as to Moore — and almost exclusive reliance on co-conspirator cooperators' testimony, the government understandably might seek at the outset to enhance its case in the jury's mind with the imprimatur of an FBI agent. But the prosecutor went too far in questioning, allowing FBI Agent Sparks to act as an expert witness with respect to gang investigations and to refer to evidence that would never be introduced at trial. The district court, in turn, failed to sustain appropriate defense objections to FBI Agent Sparks's testimony that purported to offer opinion testimony and to confirm government evidence that had yet to be introduced.

Because a witness presenting an overview of the government's case-in-chief runs the serious risk of permitting the government to impermissibly "paint a picture of guilt before the evidence has been introduced," *Griffin*, 324 F.3d at 349, and may never be introduced, *see Flores-de-Jesús*, 569 F.3d at 17, we join the circuits that have addressed the issue in condemning the practice. *Casas*, 356 F.3d at 119 (1st Cir.); *Garcia*, 413 F.3d at 214 (2d Cir.); *Griffin*, 324 F.3d at 349 (5th Cir.). *See generally* 6 Weinstein's Federal Evidence §§ 1006.04[3], 1006.08[4]. The use of overview witnesses exacerbates the "obvious dangers" this court identified in *Lemire* in the use of non-expert summarization evidence. Overview testimony offers an opportunity to "poison the jury's mind against the defendant or to recite items of highly questionable evidence." *Thomas*, 114 F.3d at 248 (citation and internal quotation marks omitted). Avoidance of those dangers is largely beyond the ability of the district court, much less the defense, to prevent. As the record here demonstrates, a trained law enforcement officer is likely to go as far as the questions allow, presenting a picture for the jury of a solid prosecution case based on his opinion of the strength and credibility of the witnesses the government plans to call to testify at trial for reasons made persuasive in view of the officer's training and experience. *See, e.g.*, May 15, 2002 AM Trial Tr. at 15-16 (prosecutor asking FBI Agent Sparks why truthful information is important). After-the-fact limiting instructions can, at best, mitigate prejudice, rather than invariably eliminate its effects completely. *See United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011); *Woodcock v. Amaral*, 511 F.2d 985, 994 (1st Cir. 1974). The view of the government's case has been implanted in the mind of the jury by an agent of the Federal Bureau of Investigation who worked on the case — he should know!

The government remains free to call as its first witness a law enforcement officer who is familiar with the pre-indictment investigation or was otherwise personally involved, where permissible under the Rules of Evidence and consistent with constitutional guarantees. *See Old Chief v. United States*, 519 U.S. 172, 186-88, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *United States v. Curtis*, 481 F.3d 836, 838, 375 U.S. App. D.C. 340 (D.C. Cir. 2007). Such a witness may, for example, be able to provide relevant background information as to the investigation's duration and scope or the methods of surveillance, based on personal knowledge. *See Flores-de-Jesús*, 569 F.3d at 19. Put another way, a law enforcement officer may "describe a complicated government program in terms that do not address witness credibility," but he may not offer "tendentious testimony." *Griffin*, 324 F.3d at 349. Thus, FBI Agent Sparks could properly describe, based on his personal knowledge, how the gang investigation in this case was initiated, what law enforcement entities were involved, and what investigative techniques were used. *See, e.g.*, May 13, 2002 PM Trial Tr. at 50-51. What he could not do was present lay opinion testimony about investigative techniques in general and opine on what generally works and what does not, as illustrated by informants who pled guilty. Neither could he anticipate evidence that the government would hope to introduce at trial about the charged offenses or express an opinion, directly or indirectly, about the strength of that evidence or he credibility of any of the government's potential witnesses, including the cooperating co-conspirators.

Although the question is close, we conclude for the following reasons that the prejudice resulting from the admission of FBI Agent Sparks's overview testimony, to the extent it was inappropriate, was ameliorated: (1) Each instance of FBI Agent Sparks's improper testimony identified by appellants was later confirmed by admissible evidence at trial, *see* Appellee's Br. at 105-07; *supra* note 10; *see also Griffin*, 324 F.3d at 350. (2) Appellants' defense was limited to cross-examining testifying cooperating co-conspirators and other government witnesses (such as Margarita Simmons, an eyewitness to the murder of her son, Richard Simmons, *see infra* Part XXIII.B), *see Garcia-Morales*, 382 F.3d at 18. (3) The district court instructed at the conclusion of FBI Agent Sparks's testimony in the government's case-in-chief that the jury was to disregard any opinion testimony he offered, *see* May 16, 2002 AM Trial Tr. at 90. (4) There was overwhelming evidence of appellants' guilt, *see, e.g., infra* Parts VII, XVIII, XXIII.B. And as to some of his impermissible opinion testimony, FBI Agent Sparks might have qualified as an expert, *see Smith*, 640 F.3d at 366. Accordingly, the error did not "affect[] the outcome of the district court proceeding[]," *United States v. Sumlin*, 271 F.3d

274, 281, 350 U.S. App. D.C. 13 (D.C. Cir. 2001) (citation and quotation marks omitted), and hence appellants are not entitled to reversal of their convictions because of improper overview testimony by FBI Agent Sparks.

The inauspicious beginning of the government's case-in-chief is easily avoided in the future. No less than the court, the Department of Justice recognizes the high standard set for the prosecution by the Supreme Court in *Berger*, 295 U.S. at 88. Similarly, this court's long-held view of the purpose of the opening statement to the jury, namely to allow the prosecutor the opportunity to provide the jury with an objective overview of the evidence that the government intends to introduce at trial, *see Thomas*, 114 F.3d at 247-48, has long afforded the prosecutor the opportunity to do that for which the prosecutor improperly used FBI Agent Sparks, *see Garcia*, 413 F.3d at 214. This court now having made clear the exacerbated "obvious dangers" of the overview witness testifying about evidence yet to be admitted before the jury affords all parties clear direction to avoid unnecessary risks — for the prosecutor of an overturned conviction, for the defense of an unfair trial, and for the district court of having to retry a case.

### C.

Much for the reasons stated in the government's brief, appellants' litany of prosecutorial misconduct claims do not, in their cumulative effect, warrant reversal. In this regard, we have considered the probable aggregate effect of any impermissible prosecutorial conduct that may have occurred on the jury's ability to judge the evidence fairly.

*See United States v. Celis*, 608 F.3d 818, 847, 391 U.S. App. D.C. 112 (D.C. Cir. 2010) (citing *Egan v. United States*, 287 F. 958, 971 (D.C. Cir. 1923)); *see also Thomas*, 114 F.3d at 246. In addressing only two of appellants' claims of prosecutorial misconduct, we implicitly have indicated that any other prosecutorial misconduct that may have occurred was minor in itself and had no prejudicial effect in view of limiting instructions. For example, appellants maintain that the prosecutor impermissibly vouched for the credibility of the government's witnesses, particularly co-conspirator cooperating witnesses, during closing rebuttal argument. Although statements such as "[t]hey're telling the truth about their experiences," Dec. 4, 2002 AM Trial Tr. at 86, impermissibly express the personal opinion of the prosecutor, they were responses, based on evidence introduced at trial, to appellants' attacks on the credibility of the government's witnesses during closing argument. *See United States v. Young*, 470 U.S. 1, 17-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *United States v. Brown*, 508 F.3d 1066, 1075-76, 378 U.S. App. D.C. 369 (D.C. Cir. 2007); *United States v. Robinson*, 59 F.3d 1318, 1323, 313 U.S. App. D.C. 330 (D.C. Cir. 1995). The prosecutor emphasized to the jurors, however, that it was their province to weigh the credibility of witnesses regardless of the arguments of counsel. *See* Dec. 4, 2002 AM Trial Tr. at 69; *cf. United States v. Nnanyererugo*, 39 F.3d 1205, 1209, 309 U.S. App. D.C. 113 (D.C. Cir. 1994). Importantly, the district court instructed the jury that it alone determined "the weight, the effect and the value of the evidence and the credibility of the witnesses," which evidence did not include counsels' opening and closing arguments. *See* Dec. 9, 2002 AM Trial Tr. at 70, 72; *see* *also Childress*, 58 F.3d at 716; *North*, 910 F.2d at 897; *United States v. Hawkins*, 595 F.2d 751, 754-55, 193 U.S. App. D.C. 366 (D.C. Cir. 1978).

Other claims of prosecutorial misconduct, including appellants' arguments relating to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and the federal bribery statute, 18 U.S.C. § 201(c)(2), *see infra* Parts VI and XII, are without merit. Similarly, appellants' claim that the prosecutor, by eliciting testimony that appellants had sought the advice of a certain named attorney to defend against criminal charges not at issue in this case, inappropriately implied that appellants were guilty because they took steps to retain this counsel, thus penalizing appellants for exercising their constitutional right to counsel under the Sixth Amendment, is without merit. *See United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973). Although some testimony might impermissibly have revealed privileged attorney-client conversations, an argument appellants do not make, there was not a direct statement by the prosecutor, as in *Yeager*, that appellants retained counsel in the instant case because they were guilty. *Cf. United States v. Liddy*, 509 F.2d 428, 442-45, 166 U.S. App. D.C. 95 (D.C. Cir. 1974) (en banc). Rather, the evidence demonstrated that the attorney linked several members of the conspiracy, including Moore and Gray.

Having considered all of appellants' claims of prosecutorial misconduct, we conclude, in light of the district court's limiting instructions regarding statements of counsel and regarding particular arguments or evidence, and the overwhelming evidence of appellants' guilt insofar as any prosecutorial misconduct is concerned, that the cumulative effect of any prosecutorial misconduct of which appellants complain did not affect the outcome of the trial, and therefore, was harmless. *See Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *see also Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

## V.

At trial, the government introduced evidence about Moore's role in an uncharged drug-trafficking conspiracy run by Rayful Edmond; Nunn's role in an uncharged conspiracy with Phyllis Webster; the apprehension of Rodman Lee, who was not a charged co-conspirator, while he was with Gray, and the contemporaneous discovery in Lee's car of cocaine and cocaine base, none of which the government claims pertained to the charged conspiracy; several uncharged murders and shootings; and Gray's uncharged conduct as a juvenile and others' perceptions of Gray as a leader while he was detained at the Oak Hill Juvenile Facility. Appellants argue that this evidence was irrelevant and highly prejudicial, admitted in violation of Rules 404(b) and 403 of the Federal Rules of Evidence. The cumulative effect of these evidentiary errors, appellants claim, deprived them of due process of law.

Rule 404(b) declares inadmissible evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b). But not all evidence of uncharged crimes, wrongs, or acts is barred by this rule. When evidence of such acts is "intrinsic" to the charged crime, it is not evidence of "other" acts and is thus wholly unregulated by Rule 404(b). *See United States v. Alexander*, 331 F.3d 116, 124-27, 356 U.S. App. D.C. 299 (D.C. Cir. 2003); *United States v. Bowie*, 232 F.3d 923, 927-28, 344 U.S. App. D.C. 34 (D.C. Cir. 2000); *United States v. Badru*, 97 F.3d 1471, 1473-75, 321 U.S. App. D.C. 137 (D.C. Cir. 1996). "Intrinsic" evidence encompasses evidence that is either "of an act that is part of the charged offense" or is of "acts performed contemporaneously with the charged crime ... if they facilitate the commission of the charged crime." *Bowie*, 232 F.3d at 929.

Rule 403 provides that even evidence otherwise admissible "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Rule 403 requires the district court to engage in "on-the-spot balancing of probative value and prejudice" and to exclude even factually relevant evidence when it fails the balancing test. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008) (quoting 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.02, at 4-16 (3d ed. 1999)) (internal quotation marks omitted).

Appellants claim that the district court should have barred the government from introducing the evidence of uncharged conduct in question because it was not "intrinsic" to the charged conduct and was therefore evidence of "other crimes, wrongs, or acts" barred by Rule 404(b). Appellants also contend that such evidence was erroneously admitted under Rule 403 because its risk of prejudice to the defendants substantially outweighed its probative value. Although appellants are likely correct that the district erred by permitting the government to introduce the evidence of uncharged conduct at issue, particularly of Moore's role in the Rayful Edmond conspiracy, Nunn's role in the Phyllis Webster conspiracy, and Gray's unlawful conduct as a juvenile, we hold that any error was not reversible.[11] Even assuming constitutional error, we will not reverse a conviction if the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In light of the amount and strength of the evidence the government presented of the charged crimes, we find that any potential error was harmless.

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[11] Circuit Judge Rogers would find error under Rule 404(b) as to the introduction of certain evidence, but nonetheless conclude the errors were harmless beyond a reasonable doubt for the reasons stated by the court. Exemplary is the testimony of Rayful Edmond, a notorious drug kingpin in the District of Columbia serving multiple life sentences in prison following his conviction. *See United States v. Edmond*, 52 F.3d 1080, 1083-84, 1087, 311 U.S. App. D.C. 235 (D.C. Cir. 1995). Edmond testified for two days at trial concerning a separate, violent conspiracy that predated the Moore and Gray conspiracy charged in the superseding indictment. The fact that Moore was involved in Edmond's conspiracy was irrelevant to the charged conspiracy, as the trial transcript belies the government's assertion that the Edmond conspiracy was the genesis of, and template for, Moore's drug-trafficking operation. Accordingly, Edmond's testimony about Moore's prior criminal activity can only be viewed as propensity evidence introduced to demonstrate Moore's bad character, *see United States v. Douglas*, 482 F.3d 591, 596, 375 U.S. App. D.C. 499 (D.C. Cir. 2007), and to "complete [Moore's] story" or "explain [his] circumstances," a practice this court rejected in *United States v. Bowie*, 232 F.3d 923, 929, 344 U.S. App. D.C. 34 (D.C. Cir. 2000). The same is true of evidence regarding Gray's unlawful conduct as a juvenile, which

## VI.

In 1996, Gray murdered Ricardo Bailey. Gray did so at the request of Rodman Lee. Gray and Lee were arrested while fleeing the scene of the murder, and a search of Lee's van revealed approximately five kilograms of cocaine hidden in a secret compartment. Lee pled guilty to the ensuing drug charges. Documents related to that plea show that Lee was a major drug dealer, that Lee was senior to Gray in status as a drug dealer, and that Lee was transporting most of the cocaine in his van to a distributor who was not implicated in the Moore and Gray conspiracy.

Appellants claim that the government's failure to disclose the information in Lee's plea documents to the defense violated the government's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

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evidence the government purported was designed to demonstrate the formation and scope of the charged conspiracy. The evidence went beyond the fact that Gray met members of the charged conspiracy while incarcerated in a facility for juvenile delinquents and served no purpose other than to show his bad character. *See Douglas*, 482 F.3d at 596.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Appellants' *Brady* claim fails because some of this information was not favorable to appellants, and because the government's failure to disclose the remainder did not cause prejudice.

The evidence showing that Lee was a higher-level drug dealer than Gray would not have aided appellants. The government itself contended that Lee was "at a higher level in terms of drugs than Kevin Gray." May 9, 2002 PM Trial Tr. at 69. According to the government, it was Lee's status as a major cocaine supplier that motivated Gray to murder Bailey on Lee's behalf.

With respect to the evidence that the drugs in Lee's van were destined for someone outside the Moore and Gray conspiracy, appellants' *Brady* claim fails because they cannot show prejudice. To show prejudice, appellants must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Pettiford*, 627 F.3d 1223, 1227, 393 U.S. App. D.C. 283 (D.C. Cir. 2010) (quoting *Strickler*, 527 U.S. at 280). "The defendant bears the burden of showing a reasonable probability of a different outcome." *United States v. Johnson*, 519 F.3d 478, 488, 380 U.S. App. D.C. 218 (D.C. Cir. 2008) (citing *Strickler*, 527 U.S. at 291).

The evidence that the drugs in Lee's van were not destined for the Moore and Gray organization would have been of minimal value to the defense. In its opening statement, the government mentioned the drugs' destination only in passing, during a lengthy description of Gray murdering Bailey. *See* May 9, 2002 PM Trial Tr. at 71. The government made no other claims about those particular drugs' intended recipient, and the drugs' destination was not material to the government's case. Rather, the drugs were significant simply because their presence corroborated the government's claim that Lee was a major drug dealer for whom Gray would be willing to kill others.

Moreover, the evidence that Lee had distributors outside the Moore and Gray organization would not have materially aided appellants. The defense had already shown that members of the Moore and Gray conspiracy were *also* involved in other drug rings. Corroboration of that fact would have had little importance, because the government did not deny that Lee, Gray, or others had illegal business not directly related to Moore and Gray's conspiracy. Criminals may of course participate in more than one conspiracy. *See, e.g., United States v. Marino*, 277 F.3d 11, 25 (1st Cir. 2002); *see also United States v. Childress*, 58 F.3d 693, 711 n.3, 313 U.S. App. D.C. 133 (D.C. Cir. 1995) ("[T]he fact that certain conspirators engage in independent drug transactions does not on its own negate the existence of a single conspiracy."). The fact that some appellants did so does not contradict the overwhelming evidence that Moore and Gray continued to collaborate on crimes long after the defense claimed they had parted ways. *See Pettiford*, 627 F.3d at 1227 ("The court . . . has a responsibility to evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record." (citation and quotation marks omitted)).

The government did not violate *Brady* with respect to the Lee evidence.

## VII.

In a superseding indictment filed on November 17, 2000, appellants and other indicted and unindicted co-conspirators were charged with participating in a drug and RICO conspiracy jointly led by Moore and Gray for over 12 years, from approximately 1988 through March 2000. Under the five-year statute of limitations applicable to these charges, *see* 18 U.S.C. § 3282, the government had to prove that Moore and Gray's joint leadership continued into the limitations period, beginning November 17, 1995.[12] *See United States v. Seher*, 562 F.3d 1344, 1364 (11th Cir. 2009). Applying well-settled law that the court must accept the jury's guilty verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," we affirm the judgment of conviction on these charges. *United States v. Dykes*, 406 F.3d 717, 721, 365 U.S. App. D.C. 381 (D.C. Cir. 2005) (citation and quotation marks omitted).

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[12] This is the latest relevant date by which the government had to prove the jointly-led conspiracy and continuing criminal enterprise existed as to any appellant. For ease of analysis we address the sufficiency of evidence as to this date for all appellants.

Appellants contend that there was insufficient evidence for the jury to find beyond a reasonable doubt that Moore and Gray jointly led a unified conspiracy through November 17, 1995. They maintain that the evidence showed there were multiple conspiracies — essentially that Moore and Gray split up their drug operations in the 1993-1994 time frame and thereafter operated separate conspiracies in different sectors of the city that came into contact with each other only casually. *See generally United States v. Tarantino,* 846 F.2d 1384, 1391-93, 269 U.S. App. D.C. 398 (D.C. Cir. 1988). Rather than maintain that the government failed to prove the traditional elements for a single conspiracy — common goal, interdependence, and, to a lesser extent, overlap of participants, *see id.* at 1393 — appellants identify the "crux of this issue" to be whether the government presented sufficient evidence that "Moore and Gray *jointly led* the charged conspiracies and [the continuing criminal enterprise] within the statute of limitations periods," Reply Br. at 88, as charged.

As support for their position, appellants point to the evidence describing Moore's relocation from the Southeast to Northeast quadrant of Washington, D.C., prior to November 17, 1995, leaving Gray to operate separately in Southeast. An examination of this evidence shows that it falls short of undermining the jury's verdict that Moore and Gray's joint leadership of a single conspiracy continued after Moore's move. For instance, appellants emphasize Raymond Sanders's testimony that Moore "dropped out of Southeast" in 1993 or 1994 and was not seen in Southeast thereafter. *See* May 20, 2002 PM Trial Tr. at 126-27. The jury, however, could reasonably have credited other testimony that Moore continued to have dealings in Southeast. *See United States v. Eppolito*, 543 F.3d 25, 54 (2d Cir. 2008); *see also Dykes*, 406 F.3d at 721. Moreover, "shifting emphases in the location of operations do[es] not necessarily require a finding of more than one conspiracy." *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006). As in *United States v. Carson*, we reject the argument that multiple conspiracies can be shown through "attempts artificially to split one conspiracy into two based simply on geographic lines." 455 F.3d 336, 376, 372 U.S. App. D.C. 251 (D.C. Cir. 2006) (citation and internal quotation marks omitted).

The central issue is whether Moore's and Gray's actions following Moore's relocation to Northeast are inconsistent with the jury's finding that they continued to jointly lead the charged conspiracy past November 17, 1995. On this point, appellants maintain that Moore's relationship with Gray changed, as shown by evidence that, according to Sanders, after the move Moore supplied Gray with cocaine *only* "a few times." May 20, 2002 PM Trial Tr. at 138. This mischaracterizes Sanders's testimony. On the previous page of the transcript of his testimony Sanders admits that he had no knowledge of who was regularly supplying cocaine to Gray, and that Gray *told him* of "a few times" that Moore had supplied cocaine. *Id.* at 137-38. This is not the same as evidence that Moore supplied Gray's operations in Southeast only a few times. Further, Maurice Andrews testified that Moore was Gray's primary supplier of large quantities of cocaine starting in 1995 and continuing at least into 1996. *See* July 9, 2002 PM Trial Tr. at 54-56; *see also Dykes*, 406 F.3d at 721. There was also evidence that Gray may have initially obtained cocaine from Ronald Alfred, and Frank Howard confirmed a separate conspiracy between himself, Alfred, and Rodman Lee, *see* July 17, 2002 PM Trial Tr. at 135. Such evidence is neither factually nor legally inconsistent with a finding that Moore and Gray continued to lead the charged conspiracy together. Here, much as in *United States v. Maynard*, 615 F.3d 544, 554, 392 U.S. App. D.C. 291 (D.C. Cir. 2010), as regards "[t]he two purportedly separate conspiracies . . . , each comprises the core conspiracy charged." And "the fact that certain conspirators engage in independent drug transactions does not on its own negate the existence of a single conspiracy." *United States v. Childress*, 58 F.3d 693, 711 n.3, 313 U.S. App. D.C. 133 (D.C. Cir. 1995).

The government offered ample evidence of a jointly led conspiracy through November 17, 1995. This evidence extends to both the conspiracy's geographic scope and its twin principal aims: to unlawfully distribute drugs and commit murders. *See* Superseding Indict. at 4-5. The key testimony as regards the drug operation in Northeast came from Andrews, who accompanied Gray on a daily basis in 1996. July 9, 2002 PM Trial Tr. at 88. Andrews testified that Gray "had a lot of guys over [in Northeast]," including Moore's cousins, uncles, and brother. *Id.* at 82-84. Each of these family members participated in Gray's Northeast drug business, which involved Moore as well. *See id.* at 85, 86. Indeed, Andrews testified that Moore was the person "in particular responsible for overseeing the drug operation in that area of 7th and H, Northeast." *Id.* at 88. Moore and Gray's joint stewardship in Northeast after November 17, 1995, is established most clearly by Andrews's answers on the government's direct examination:

> Q: How often, when you were hanging out with Kevin Gray every day, Mr. Andrews, how often would you go over to Northeast, Washington?
>
> A: Every day.
>
> Q: And why would you go over to Northeast every day?
>
> A: [Gray] had money over there to pick up and basically we'll go to see [Moore] and then meet [Moore] and them.
>
> Q: And did that occur right on up through at least 1995 and 1996 and into 1997?
>
> A: Correct.

*Id.* at 88-89.

There was also sufficient evidence that Moore and Gray's joint leadership of the conspiracy continued after November 17, 1995, at a Southeast apartment complex located on Halley Terrace. Gray oversaw the drug operation in which Andrews, David Arnold, and Jermaine Vick participated. Although Arnold testified that "Moore never had any dealings with us down on Halley Terrace," Aug. 22, 2002 PM Trial Tr. at 16, Vick and Andrews testified that Moore supplied the Southeast operation with drugs. *See* Sept. 10, 2002 AM Trial Tr. at 11 (Vick); Oct. 16, 2002 AM Trial Tr. at 56 (Andrews); *see also Dykes*, 406 F.3d at 721. Moreover, Andrews's testimony makes clear that this relationship at Halley Terrace continued for six to eight months until a temporary two-month fallout between Moore and Gray around the time of the February 1998 NBA All-Star Game in New York. *See* Oct. 16, 2002 AM Trial Tr. at 56-60. Contrary to appellants' contention that Moore's actions hardly reflected that of a "leader," Appellants' Br. at 161, Vick recalled that Moore came to see Gray "[w]hen he need[ed] to see [Gray] or, you know, he need[ed] to deliver some important information or something like that, or *he needed somebody to carry out a task*." Sept. 10, 2002 AM Trial Tr. at 12 (emphasis added). Likewise, Oscar Veal testified that he met Moore at Halley Terrace to discuss murders of targets in Northeast through 1997. *See* Aug. 27, 2002 AM Trial Tr. at 13. From this evidence, the jury could reasonably infer that Moore's absence from time to time did not necessarily point toward a non-leadership role; instead it might suggest that Moore was a principal acting in a supervisory role, while Gray coordinated the day-to-day operations.

Finally, the jury could have reasonably relied on evidence concerning Veal's 1998 murder of Roy Cobb, a rival drug dealer, well into the statutory limitations period. As Veal recounts, Gray drove both of them from Southeast to meet Moore at a location in Northeast. Once there, and in the presence of other members of the conspiracy, Moore and Gray discussed killing Cobb. Having already devised a plan for the murder, Moore and Gray walked Veal to a specific location where it was known that Cobb would stop at an intersection, and instructed Veal on how to go about killing Cobb. Although Moore and Gray continued to refine and change the plan, Gray provided Veal with the gun used to murder Cobb and afterward Moore compensated Veal with cash and cocaine. *See id.* at 50-55, 90; *see also* Oct. 16, 2002 AM Trial Tr. at 108-11, 116-20.

In sum, the evidence on which appellants rely in attempting to demonstrate that Moore and Gray ceased to serve as joint leaders of the charged conspiracy in 1993 or 1994 does not support the weight they place upon it, could reasonably have been rejected by the jury in light of other witnesses' contrary testimony, or is irrelevant to the existence of joint leadership. Mindful that "'the prosecution's evidence is to be viewed in the light most favorable to the government, drawing no distinction between direct and circumstantial evidence, and giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact,'" *Dykes*, 406 F.3d at 721 (quoting *United States v. Foster*, 783 F.2d 1087, 1088, 251 U.S. App. D.C. 272 (D.C. Cir. 1986)), we hold that sufficient evidence supported the jury's finding that Moore and Gray jointly led the charged conspiracy within the limitations period.

## VIII.

Appellants argue that all charges under the District of Columbia Code were improperly joined to their federal indictment under Rule 8(b) of the Federal Rules of Criminal Procedure. Because joinder was improper, appellants maintain, the district court lacked jurisdiction to hear those charges under § 11-502(3) of the District of Columbia Code, which provides that "the United States District Court for the District of Columbia has jurisdiction of . . . [a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense."

We have interpreted the term "joined" in § 11-502(3) to mean "properly joined under [Federal Rule of Criminal Procedure] 8." *United States v. Jackson*, 562 F.2d 789, 793, 183 U.S. App. D.C. 270 (D.C. Cir. 1977). Under Rule 8(b), joinder of the local charges was proper here only if all the offenses charged were part of the same "series of acts or transactions." *See id.* at 794 (holding that "the propriety of joinder in cases where there are multiple defendants must be tested by Rule 8(b) alone and that Rule 8(a) has no application"); FED. R. CRIM. P. 8(b) ("The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses."). Appellants' contention is that the superseding indictment and the evidence adduced at trial demonstrate that the local charges were not properly joined under Rule 8(b), and that the district court therefore lacked jurisdiction. We disagree.

We have held that "a 'series of acts or transactions' is 'two or more acts or transactions connected together or constituting parts of a common scheme or plan.'" *United States v. Brown*, 823 F.2d 591, 598, 262 U.S. App. D.C. 183, (D.C. Cir. 1987) (quoting *United States v. Perry*, 731 F.2d 985, 990, 235 U.S. App. D.C. 283 (D.C. Cir. 1984)).

Construing the facts of the superseding indictment as true, as we must, *United States v. Zicree*, 605 F.2d 1381, 1387 (5th Cir. 1979); *see United States v. Carson*, 455 F.3d 336, 372-73, 372 U.S. App. D.C. 251 (D.C. Cir. 2006); *United States v. Spriggs*, 102 F.3d 1245, 1255-56 (D.C. Cir. 1996), the local offenses charged were committed as acts in furtherance of the charged conspiracy and/or as predicate acts in the charged RICO conspiracy. All of the charged offenses, local and federal, were thus part of a common scheme or plan, which means that, for purposes of Rule 8(b), they were part of the same series of acts or transactions. *See Carson*, 455 F.3d at 373-74. Because we conclude that the superseding indictment establishes that joinder of the local offenses was proper, we hold the district court had jurisdiction under § 11-502(3).

Even if the evidence adduced at trial had demonstrated that all of the offenses were not part of the same series of acts or transactions — a proposition we reject — this would not strip jurisdiction from the district court. If the indictment establishes proper joinder under Rule 8(b), trial evidence cannot render joinder impermissible and is thus irrelevant to our inquiry. *Spriggs*, 102 F.3d at 1255 ("Rule 8(b) can be satisfied . . . by the indictment alone . . . ."); *Perry*, 731 F.2d at 990 (explaining that "[q]uite obviously, the indictment might satisfy th[e] requirement" for Rule 8(b) joinder).

## IX.

Appellants contend that the introduction into evidence of autopsy reports authored by the Office of the Chief Medical Examiner of the District of Columbia and reports of drug analyses performed by the U.S. Drug Enforcement Administration ("DEA") violates the Confrontation Clause of the Sixth Amendment to the Constitution because the reports' authors were not available for cross-examination. Our review of the district court's legal conclusions regarding the Confrontation Clause is *de novo*, *United States v. Carson*, 455 F.3d 336, 362, 372 U.S. App. D.C. 251 (D.C. Cir. 2006), and subject to constitutional harmless error analysis pursuant to *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *see United States v. Smith*, 640 F.3d 358, 364, 395 U.S. App. D.C. 95 (D.C. Cir. 2011); *United States v. Wilson*, 605 F.3d 985, 1014, 390 U.S. App. D.C. 368 (D.C. Cir. 2010).

The landscape of the Supreme Court's jurisprudence on the Confrontation Clause has changed since appellants' trial concluded in 2003. The governing rule at the time, set forth in *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), was that out-of-court statements admitted against a criminal defendant avoided the requirements of the Confrontation Clause if they came within traditional hearsay exceptions or were otherwise reliable. In 2004, however, the Supreme Court relied on the Confrontation Clause's historical underpinnings to hold that "testimonial" out-of-court statements of a declarant not testifying at trial were inadmissible under the Confrontation Clause unless the declarant was unavailable and previously subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Statements qualifying as "testimonial" included "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," other "formalized" materials such as "affidavits, depositions, prior testimony, or confessions," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (citations and quotation marks omitted). The Court applied *Crawford* in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2531-32, 174 L. Ed. 2d 314 (2009), to hold that the state's use of a forensic laboratory report to prove that seized cocaine was of a certain quality and quantity violated the Confrontation Clause because no live witness competent to testify to the truth of the statements made in the report was available for cross-examination.

The Supreme Court's most recent decision on the Confrontation Clause is *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (U.S. 2011). After failing field sobriety tests and refusing a breath test, Bullcoming was arrested and required to give a blood sample for the purpose of determining his blood-alcohol concentration ("BAC"). Bullcoming's blood sample was sent to the New Mexico Department of Health, Scientific Laboratory Division, where a forensic analyst signed a "certificate of analyst," part of a standard form titled "Report of Blood Alcohol Analysis," recording Bullcoming's BAC as 0.21 grams per hundred milliliters. New Mexico charged Bullcoming with aggravated driving under the influence of intoxicating liquor, which requires proof of a BAC of 0.16 grams per hundred milliliters. At trial the prosecutor introduced the report and certificate of analyst into evidence as a business record. The forensic analyst who authored the report did not testify at trial and was not otherwise subject to cross-examination by Bullcoming. Instead, the prosecutor called as a witness a scientist from the same laboratory who had not signed the Report of Blood Alcohol Analysis, and neither participated in nor observed the test on Bullcoming's blood sample. The testifying scientist was, however, familiar with blood-alcohol analysis and the laboratory's testing protocols. *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 617. Defense counsel objected on Confrontation Clause grounds, and noted that "her opening, indeed, her entire defense 'may very well have been dramatically different'" had the prosecution disclosed prior to the day of the trial that it would not be calling the certifying analyst as a witness. 131 S. Ct. 2705, 180 L. Ed. 2d 610, 618 (citation omitted).

The Supreme Court held that the Report of Blood Alcohol Analysis was "testimonial" and therefore within the ambit of the Confrontation Clause, a resulted dictated by *Melendez-Diaz.* 131 S. Ct. 2705, 180 L. Ed. 2d 610, 623. It further clarified that the "surrogate testimony" of the substitute witness "does not meet the constitutional requirement [of cross-examination]. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular [analyst]." 131 S. Ct. 2705, 180 L. Ed. 2d 610, 614. Three aspects of the Court's reasoning are noteworthy here: First, the Court framed the question presented as whether "the Confrontation Clause permit[s] the prosecution to introduce a forensic laboratory report containing a testimonial certification . . . through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." *Id.* at 78; *see also* 131 S. Ct. 2705, 180 L. Ed. 2d 610, 614 (Sotomayor, J., concurring in part). Second, the Court rejected the argument that Bullcoming's "true accuser" was the gas chromatagraph machine that generated the BAC figure and that the analyst's role was that of a "mere scrivener." 131 S. Ct. 2705, 180 L. Ed. 2d 610, 620 (majority opinion). Third, the Court explained that a surrogate witness knowledgeable as to the equipment and protocol used in administering the test was ill-equipped to "convey what [the certifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." 131 S. Ct. 2705, 180 L. Ed. 2d 610, 622.

The facts of the instant case resemble in part those of *Bullcoming.* The government called as witnesses Dr. Jonathan Arden, then-Chief D.C. Medical Examiner, and Jerry Walker, a DEA senior forensic chemist. Dr. Arden testified as to the contents of approximately 30 autopsy reports authored by other medical examiners in his office, but, as in *Bullcoming,* insofar as the record provided by the parties shows, he neither performed nor observed the autopsies and his signature does not appear on any of the reports.[13] Similarly, Walker's testimony concerned 24 drug analyses, 20 of which were performed by other DEA forensic chemists on drugs seized in the course of the investigation of the charged conspiracy, the results of which were memorialized in DEA reports. The autopsy and DEA reports were admitted into evidence over appellants' objection that "there is no way to . . . confront under the Sixth Amendment" unless the government calls the reports' authors as witnesses. Oct. 23, 2002 PM Trial Tr. at 90.

This case differs from *Bullcoming* in three relevant respects. First, because Walker testified that he authored four DEA reports, *see* Oct. 23, 2002 PM Trial Tr. at 68, and he was available for cross-examination at trial, these four DEA reports present no Confrontation Clause problem under *Bullcoming*.[14] The other 20 DEA reports, however, remain at issue.

Second, Walker personally reviewed, but did not author, one DEA report shortly after its creation, testifying that "[he] look[ed] at what the results [were] . . . and ma[d]e sure that [the analyst] used proper scientific-based knowledge to come up with [the] results." *Id.* at 80. Although the analysis in *Bullcoming* indicates that the degree of participation by the surrogate witness can alter the Confrontation Clause analysis, *see Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 622; *id.* at 5-6 (Sotomayor, J., concurring in part), Walker's role appears to be much like that of the surrogate witness in *Bullcoming* because he was unable to "convey what [the authoring forensic chemist] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed," or "expose any lapses or lies on the [authoring forensic chemist's] part," 131 S. Ct. 2705, 180 L. Ed. 2d 610, 622 (majority opinion). Walker did not observe the test being performed and did not sign the DEA report as the approving official. Rather, Walker testified that, in performing his review, he was "making an assumption that the chemist used the sample and did the analysis. . . . I'm making the assumption that they did do each of the tests that they wrote down on their worksheet." Oct. 23, 2002 PM Trial Tr. at 81. In holding there was constitutional error in *Bullcoming*, the Supreme Court relied on a similar statement by the testifying surrogate witness: "you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance." *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 622 n.8 (alteration in original) (citation and quotation marks omitted).

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[13] The autopsy report of Jaime Pereira, performed by a medical examiner for the Commonwealth of Virginia, was admitted into evidence pursuant to stipulation, and thus raises no Confrontation Clause issue. *See Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, slip op. at 1.

[14] Of the four Walker-authored DEA reports, only the DEA report dated May 15, 2000, relating to the March 20, 2000 seizure of drugs from Nunn, appears to have been made a part of the multi-volume record on appeal provided by the parties.

Third, Dr. Arden testified as the Chief D.C. Medical Examiner, and prior to trial he may well have had either a "supervisor[y]" role with regard to the reports from his Office or even "a personal, albeit limited, connection to the [autopsies] at issue." 131 S. Ct. 2705, 180 L. Ed. 2d 610, 629 (Sotomayor, J., concurring in part). Whether such reports would be inadmissible under the Confrontation Clause despite his testimony is a question left open in *Bullcoming*, where the Court was confronted only with a testifying lab technician who had "no involvement whatsoever in the relevant test and report." 131 S. Ct. 2705, 180 L. Ed. 2d 610, 629.

The government's attempts to avoid the Confrontation Clause, on the grounds that the autopsy reports rank as non-testimonial and that the DEA reports contain "raw data," rather than "statements," Appellee's Br. at 185-87, 189, are foreclosed by *Bullcoming*.[15]

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[15] The government suggests that Dr. Arden's and Walker's testimony was permissible as expert testimony pursuant to Federal Rule of Evidence 703. Appellee's Br. at 187, 189. The authority on which the government relies is distinguishable because the forensic reports in those cases were not introduced into evidence at trial. *See, e.g., United States v. Pablo*, 625 F.3d 1285, 1294 (10th Cir. 2010); *United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010). It could well be a different case where an expert witness discussed out-of-court testimonial statements that "were not themselves admitted as evidence." *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 629 (Sotomayor, J., concurring in part); *see also People v. Williams*, 238 Ill. 2d 125, 939 N.E.2d 268, 345 Ill. Dec. 425 (Ill. 2010), *cert. granted*, No. 10-8505 (U.S. June 28, 2011). Any expert testimony by Dr. Arden and Walker does not avoid the fact that the autopsy and DEA reports were admitted into evidence at appellants' trial. Moreover, we note but need not decide whether Dr. Arden's or Walker's testimony qualifies as proper expert opinion based on testimonial statements inadmissible under the Confrontation Clause absent live in-court testimony by the

First, "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" are testimonial statements. *Melendez-Diaz*, 129 S. Ct. at 2532 (citation and quotation marks omitted). Put another way, "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 612 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532). The Supreme Court concluded the certifications in the laboratory report analyzing Bullcoming's BAC were testimonial because "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations," the certifying forensic analyst "tested the evidence and prepared a certificate concerning the result of his analysis," the certificate was formalized in a signed document and headed a "report," and the document referenced court rules relating to the

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declarant. Other courts have held that an expert runs afoul the Confrontation Clause when he "parrot[s] out-of-court testimonial statements . . . directly to the jury in the guise of expert opinion." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) (citation and internal quotation marks omitted); *see, e.g., Pablo*, 625 F.3d at 1291-95. Here, the testimony by Dr. Arden and Walker often relayed the contents of reports. For example, responding to the prosecutor's question about what "the report indicate[s]" regarding soot or gunpowder marks on the arm of Anthony Dent, Dr. Arden testified that "[the report] specifically says that . . . soot or gunpowder tattooing . . . are mentioned as being absent." June 4, 2002 AM Trial Tr. at 9. Likewise, examination relating to the DEA reports typically consisted of Walker confirming a lab number on an exhibit and stating the conclusion of the report regarding the tested drugs. *See, e.g.*, Oct. 23, 2002 PM Trial Tr. at 97, 98, 106, 111, 114, 118-20, 122-25.

admissibility of certified blood-alcohol analyses. 131 S. Ct. 2705, 180 L. Ed. 2d 610, 615.

Analogous circumstances make the autopsy reports here testimonial.[16] The Office of the Medical Examiner is required by D.C. Code § 5-1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner] — use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports." These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (citation and quotation marks omitted).

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[16] Certain duties imposed by the D.C. Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. *See Melendez-Diaz*, 129 S. Ct. at 2532; *cf. Michigan v. Bryant*, 131 S. Ct. 1143, 1155-56, 179 L. Ed. 2d 93 (2011).

Second, as to the suggestion that the DEA reports contained only "raw data," the Supreme Court rejected the same characterization that "Bullcoming's true accuser . . . was the [gas chromatography] machine, while [the] testing analyst['s] ... role was that of mere scrivener." *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 620 (citation and internal quotation marks omitted). The Court emphasized that the analyst "reported more than a machine-generated number" when he

> certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition ... affect[ed] the integrity of the sample or . . . the validity of the analysis." These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.

*Id.* (alterations and ellipses in original) (internal citations omitted). Likewise here, the forensic chemists who authored the DEA reports made several representations, for example, that they were trained DEA chemists who followed certain procedures regarding the marking of containers and the inspection of seals, and that the chemical reagents and/or analytical instruments used were free from contamination and operating properly. The record in this court submitted by the parties does not indicate appellants had an opportunity to cross-examine the forensic chemists about their representations. And just as the Supreme Court concluded that the performance of a blood-alcohol analysis using gas chromatography was a "matter . . . not so simple or certain," 131 S. Ct. 2705, 180 L. Ed. 2d 610, 617 n.1, and subject to "human error . . . at each step," 131 S. Ct. 2705, 180 L. Ed. 2d 610, 617, the DEA drug analysis process requires forensic chemists to weigh substances, make calculations, and choose the correct "color test for a particular kind of exhibit," Oct. 23, 2002 PM Trial Tr. at 130, a process also subject to human error. Indeed, one type of test used by the DEA forensic chemists involved gas chromatography. *See id.*

Non-structural constitutional error, such as violation of the Confrontation Clause, requires vacation of a conviction only where the error was not harmless beyond a reasonable doubt. *See Wilson*, 605 F.3d at 1014 (citing *Chapman*, 386 U.S. at 24). As regards the autopsy reports, there was other evidence at trial that the 31 murders occurred by gunshots fired by members of the charged conspiracy. For example, there was testimony by cooperating co-conspirators that Gray claimed credit for shooting Anthony Dent and that Handy claimed credit for murdering Demetrius Green, and there was eyewitness testimony that Handy shot Richard Simmons. Assuming error with respect to admission of the autopsy reports, and thus not reaching the question left open in *Bullcoming*, 131 S. Ct. 2705, 180 L. Ed. 2d 610, slip op. at 5-6 (Sotomayor, J., concurring in part), we hold the error was harmless beyond a reasonable doubt.

With respect to those drug convictions dependent on a specific weight and/or quality and quantity (Counts 126-138 of the superseding indictment), any improperly admitted DEA reports, which were testimonial and within the ambit of the requirements of the Confrontation Clause, may have caused prejudicial error. The parties' briefs could not address *Bullcoming*, which was decided by the Supreme Court after oral argument, and the parties did not address which specific counts of the superseding indictment may or may not be sustained on other grounds. Accordingly, we remand to the district court to determine whether the admission of the DEA reports was error under *Bullcoming* and which counts underlying the judgment of conviction must be vacated, *see Smith*, 640 F.3d at 364, because the government cannot establish that the error was harmless beyond a reasonable doubt.

## X.

Under the Jencks Act, prosecutors must disclose "any statement" of a government witness "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). A statement includes "a written statement made by said witness and signed or otherwise adopted by him," as well as any "substantially verbatim recital" of the witness's oral statements "recorded contemporaneously with the making of such oral statement." *Id.* § 3500(e). In the course of its lengthy investigation of appellants, the government created reports of many witness interviews. Appellants argue that the district court abused its discretion when it declined to review, *in camera*, all of the reports of interviews of government witnesses who later testified at trial, in order to determine whether any of those records contained Jencks Act statements. We disagree.

A district court has an "affirmative duty" to "engage in an adequate inquiry into the nature of the documents before ruling against Jencks Act production." *United States v. Stanfield*, 360 F.3d 1346, 1355, 360 U.S. App. D.C. 305 (D.C. Cir. 2004). However, a defendant cannot compel a district court judge to sift through every record in the government's possession merely by speculating that somewhere in those records there might be Jencks Act statements. Rather, the defense must raise a "colorable claim" that a specific document or set of documents contains Jencks statements. *See, e.g., United States v. Price*, 542 F.3d 617, 621 (8th Cir. 2008); *United States v. Roseboro*, 87 F.3d 642, 646 (4th Cir. 1996).

The interview reports in question here were written by law enforcement officers, not by the witnesses themselves. Such reports generally do not qualify as Jencks Act statements; they are not usually a "substantially verbatim recital" of the witness's words or "adopted or approved by" the witness. *Cf. Price*, 542 F.3d at 621; *Roseboro*, 87 F.3d at 646. Moreover, even if the interviewer wrote down a few of the witness's exact words, there is no "substantially verbatim recital" if the interviewer engaged in "substantial selection" in quoting the witness. *United States v. Donato*, 99 F.3d 426, 433, 321 U.S. App. D.C. 287 (D.C. Cir. 1996) (quoting *Palermo v. United States*, 360 U.S. 343, 352-53, 79 S. Ct. 1217, 3 L. Ed. 2d 1287, 1959-2 C.B. 480 (1959)). There is thus little reason to believe that the interview reports in this case generally contained Jencks statements, and no reason to insist that the district court review every such report.

On two occasions, appellants cross-examined government witnesses in an attempt to establish a colorable claim that specific witnesses' prior interviews had produced Jencks statements. The closest appellants came was the following exchange:

> Defense: Do you recall whether or not while you were speaking and the times when these people were taking notes whether they asked you to slow down so they could write something down that you were saying?
>
> Witness: No.
>
> Defense: Did you [sic] anyone ask you to repeat yourself?
>
> Witness: Probably so. I'm not sure.

A witness's guess that an interviewer probably asked him to repeat himself at some point during an interview does not create anything more than speculation that the report of that interview is a "substantially verbatim recital" of the interview. *Cf. Roseboro*, 87 F.3d at 646. Under those circumstances, the district court did not abuse its discretion in declining to review the resulting report, much less every interview report created during the investigation.

## XI.

At trial, the government elicited testimony from two former members of the Moore and Gray conspiracy that they had converted to Islam and that their religious conversion motivated them to testify for the prosecution. On cross-examination, the defense attempted to demonstrate that the conversions of those two witnesses were a sham. The defense also questioned the legitimacy of many other government witnesses' religious beliefs, even though the government had not raised the issue on direct examination of those witnesses. The government in turn sought to defend the genuine nature of its witnesses' religious beliefs.

Appellants contend that the government's elicitation of testimony with respect to its witnesses' faith violated Federal Rule of Evidence 610. That rule states: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

The government responds that the testimony of the two witnesses did not fall within Rule 610 because the evidence was offered "for the purpose of showing interest or bias because of" religious beliefs. FED. R. EVID. 610 advisory committee's notes. According to the government, the witnesses' religious conversion refuted an accusation of bias — namely, the accusation that the witnesses were testifying solely to receive favorable plea agreements. The government thus argues that this testimony went to the witnesses' motive, not their credibility.

We need not decide which side has the better argument, because even assuming *arguendo* that there was error in allowing this testimony, the error was harmless. *See* FED. R. CRIM. P. 52(a). The government elicited very little religious testimony of its own accord. It made no mention of that testimony in opening or closing; it never urged the jury to credit its witnesses on account of their faith. *Cf. United States v. Spinner*, 152 F.3d 950, 961-62, 332 U.S. App. D.C. 1 (D.C. Cir. 1998). Whatever slight influence those two witnesses' religious conversions could have had on the jury is insignificant alongside the overwhelming evidence of appellants' guilt in this case. *See Kotteakos v. United States*, 328 U.S. 750, 765, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

Moreover, the defense thoroughly probed the issue of religious faith not only with the two witnesses who discussed their religion on direct examination, but with many others as well. Appellants admit that they did so both to impugn the government witnesses' credibility and to support their own claim that the government witnesses used Friday prison prayer services to coordinate false testimony against appellants. On this record, the defense's extensive cross-examination on this topic cannot be used to transform a government error (assuming error) that was a relatively minor part of the trial into a reversible error. *See Lurk v. United States*, 296 F.2d 360, 361, 111 U.S. App. D.C. 238 (D.C. Cir. 1961).

## XII.

Nunn maintains that the district court erred in denying his motion for a new trial. *See United States v. Gray*, 292 F. Supp. 2d 71, 91-94 (D.D.C. 2003). Although the motion raised four issues, this part addresses only Nunn's contention that the testimony of Steve Graham was procured by the government in violation of the federal bribery statute, 18 U.S.C. § 201(c)(2), which provides that "[w]hoever . . . gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . shall be fined . . . or imprisoned for not more than two years, or both."[17] Graham testified that Nunn was Gray's drug supplier and described two drug transactions between Gray and Nunn. *See* Nov. 4, 2002 AM Trial Tr. at 14-26. Our review of the district court's denial of a new trial is for abuse of discretion. *United States v. Johnson*, 519 F.3d 478, 487, 380 U.S. App. D.C. 218 (D.C. Cir. 2008).

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[17] Nunn's claims regarding Federal Rule of Evidence 404(b) and severance pursuant to Federal Rule of Criminal Procedure 14 are addressed in Parts V and XXII, respectively.

Graham was indicted for participating in the charged drug and RICO conspiracies, but his trial was severed from that of the other co-conspirators. After refusing offers by the government to enter into a plea agreement and cooperate with the government, he was convicted by a jury of conspiracy to distribute heroin or cocaine base and possession with intent to distribute heroin. The district court sentenced Graham to two concurrent 210-month terms of incarceration, followed by two concurrent sentences of five years' incarceration, and three years of supervised release. *See United States v. Graham*, 317 F.3d 262, 265-66, 354 U.S. App. D.C. 360 (D.C. Cir. 2003). More than a year after sentencing, this court in December 2001 appointed new counsel to represent Graham on appeal. New counsel explained the benefits of cooperating with the government and the terms of such cooperation, something that Graham claims his trial counsel failed to do. *See* Nov. 6, 2002 AM Trial Tr. at 66-67, 70.

In March 2002, Graham contacted the prosecutor's office to express his desire to cooperate. On October 11, 2002, the government and Graham entered into an agreement whereby Graham would cooperate fully with the government and testify truthfully at appellants' trial. The agreement stipulated that "the usefulness of the information supplied . . . could not have reasonably been anticipated by [Graham] until more than a year after his sentencing and that [Graham] promptly provided information to the government after its utility was reasonably apparent to him." *Gray*, 292 F. Supp. 2d at 92. This language tracks an amendment now found in Federal Rule of Criminal Procedure 35(b)(2)(C),[18] effective December 2002, providing an additional basis for granting a sentencing reduction based on a defendant's substantial assistance to the government. The agreement also memorialized the government's intention to file a Rule 35 motion. *See Gray*, 292 F. Supp. 2d at 92.

In Nunn's view, Graham cooperated with the government and testified against appellants because the government agreed to file an untimely and improper Rule 35(b) motion on his behalf. This agreement constituted, in Nunn's words, a "Faustian bargain," Appellants' Br. at 194, because it represented that Graham realized the importance of the information he possessed only upon appointment of new appellate counsel more than one year after sentencing, when, according to Nunn, Graham possessed this information at the time of his arrest and knew of its potential value. Nunn thus contends that the government, aware that Graham was ineligible for a Rule 35(b)(2)(C) sentence reduction, nonetheless unlawfully offered Graham leniency in exchange for his cooperation.

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[18] Federal Rule of Criminal Procedure 35(b)(2)(C) provides

> (2) Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
>
> * * *
>
> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

The advisory committee notes that "[w]hat constitutes 'prompt' notification will depend on the circumstances of the case." Fed. R. Crim. P. 35 advisory committee's note to 2002 amendments.

*United States v. Ramsey*, 165 F.3d 980, 334 U.S. App. D.C. 193 (D.C. Cir. 1999), is controlling. Ramsey was convicted of a drug crime based on testimony by an informant named Fierro. Ramsey challenged his conviction on the ground that the federal bribery statute made it unlawful for the government to offer Fierro leniency in exchange for his cooperation and testimony. This court affirmed, holding that the bribery statute was not by its terms applicable to the United States when read in conjunction with the Dictionary Act, 1 U.S.C. § 1, and reasoned that a contrary conclusion would deprive the federal government of its longstanding ability to plea bargain, thereby creating absurd results. *See Ramsey*, 165 F.3d at 986-91. As additional justification, this court concluded that "even if federal prosecutors were subject to [the federal bribery statute], that fact would not justify excluding Fierro's testimony" under the exclusionary rule because Congress had prescribed only a monetary fine and imprisonment as punishments. *Id.* at 991.

Counsel for Nunn conceded at oral argument that "the cases are legion[] that the government is allowed to exchange leniency for testimony." Oral Arg. Tr. at 55. Even if the federal bribery statute were applicable, a violation would not change the course of Nunn's trial because the exclusionary rule would not operate to prevent the government from eliciting Graham's testimony. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), is not to the contrary. Nunn relies on a concurring opinion for the proposition that "[p]rosecutors may offer only those incentives that Congress has approved, and may bargain and execute agreements only within the narrow, specific procedures that Congress and the courts have articulated." *Id.* at 1308 (Lucero, J., concurring). The majority likewise stated: "Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign." *Id.* at 1302 (majority opinion). A motion under Rule 35 is functionally little different from the plea bargain at issue in *Singleton* and the leniency afforded to the informant in *Ramsey*, save for the timing. *Cf. United States v. Ridge*, 329 F.3d 535, 541 (6th Cir. 2003); *United States v. Vargas-Deleon*, 124 F. App'x 854, 858-59 (5th Cir. 2005). Because the district court acted within its discretion in crediting Graham's stipulation that he realized the usefulness of the information he possessed only upon the explanation by new appellate counsel, the government's Rule 35 motion meets the *Singleton* test, even assuming *arguendo* its applicability here.

Accordingly, we hold that the district court did not abuse its discretion in denying Nunn's motion for a new trial motion based on Graham's testimony.

### XIII.

Gray's contention that the district court abused its discretion in denying his request for a destruction of evidence instruction is manifestly without merit. This court has no authority to depart from *Arizona v.*

*Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), requiring bad faith destruction, *see Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), a showing Gray concedes he cannot make, *see* Appellants' Br. at 204.

## XIV.

Appellants requested that the district court instruct the jury on its theory that the government demonstrated, at most, that they engaged in multiple independent conspiracies, not a single joint conspiracy. Appellants submitted several proposed instructions to the court on this theory; the district court refused to give appellants' proposed instructions, four of which are now at issue on appeal. *See* Nov. 20, 2002 PM Trial Tr. at 47-56.

We have held that a "theory-of-defense instruction is in order if there is 'sufficient evidence from which a reasonable jury could find' for the defendant on his theory." *United States v. Hurt*, 527 F.3d 1347, 1351, 381 U.S. App. D.C. 259 (D.C. Cir. 2008) (quoting *United States v. Glover*, 153 F.3d 749, 754, 332 U.S. App. D.C. 74 (D.C. Cir. 1998)). However, we have also made clear that a failure to provide a requested defense instruction is not reversible error unless the instruction: "(1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *United States v. Taylor*, 997 F.2d 1551, 1558, 302 U.S. App. D.C. 349 (D.C. Cir. 1993) (quoting *United States* *v. Grissom*, 645 F.2d 461, 464 (5th Cir. 1981)) (internal quotation marks omitted).

No one disputes that appellants were entitled to an instruction on their theory that the government had proven, at most, multiple conspiracies rather than a single conspiracy. Indeed the district court gave such an instruction:

> The defendants contend that the government's proof at trial is at variance from the conspiracy charged in Count One of the indictment; that is, that the evidence presented at trial, if believed, would constitute multiple conspiracies rather than a single overall conspiracy. Whether a single conspiracy, multiple conspiracies or no conspiracy at all existed is for you to decide. . . . Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment. What you must determine is whether the single conspiracy as charged in Count One existed between two or more conspirators. If you find that no such conspiracy existed, you must acquit the defendants of this charge. If, however, you find the government has proved beyond a reasonable doubt that the defendants were involved at any point during the period charged in the indictment in an integrated, ongoing, common effort to distribute controlled substances, then you may find them guilty of the single conspiracy charged in Count One. In making this determination,

> you should consider whether the conspirators share a common goal . . . . You may also consider the extent to which members of the conspiracy depended on one another to accomplish the goal of narcotics distribution, the overlap of participants in the various operations of the conspiracy, and the quality, frequency, and duration of each conspirator's transactions.

Dec. 9, 2002 AM Trial Tr. at 108-10. Rather, the question here is whether the court's refusal to provide the specific instructions requested by appellants constitutes reversible error. We hold that it did not.

Appellants requested the following instructions:

> *Instruction 3.* To determine whether the evidence supports a single conspiracy as opposed to multiple conspiracies, you must examine whether the defendants shared a common goal, any interdependence among the participants, and any overlap among the participants in the allegedly separate conspiracies. The overlap requirement is satisfied only if the main figures in the alleged conspiracy are involved in all of the conspiracy's alleged scheme.
>
> *Instruction 4.* In this case, the government alleges what is known as a 'hub and spoke' conspiracy. The government alleges that Mr. Gray and Mr. Moore were at the hub of the conspiracy, and that the other defendants,

> in addition to other conspirators, were the 'spokes.' However, in order to prove such a conspiracy, it must be shown that there is a direct conspiratorial interrelationship, also known as 'interdependence,' among those on the 'spokes' of the conspiracy, in addition to their relationship to those at the hub.
>
> *Instruction 5.* In order for the defendants to be convicted of Count One, the evidence must demonstrate beyond a reasonable doubt that each defendant knew or had reason to know the scope of the distribution and retail organization involved, and had reason to believe that their own benefits derived from the operation [were] dependent upon the success of the entire venture.
>
> *Instruction 6.* A single conspiracy exists if there is one overall agreement among various parties to perform different functions in order to carry out objectives of [the] conspiracy, while multiple conspiracies exist if each of the conspirators' agreements has its own end and constitutes an end in itself.

We cannot conclude that the failure to provide any of the proposed instructions "seriously impaired the defendant's ability to effectively present a given defense." *Taylor*, 997 F.2d at 1558. In light of the district court's comprehensive instructions to the jury about the defense's multiple-conspiracies theory, which mentioned all of the factors relevant to the jury's determination, we find that appellants were able to effectively present their defense.

## XV.

Count 2 charged Moore with engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848. To convict under § 848, the government must prove that the defendant committed: "1) a felony violation of the federal narcotics law; 2) as part of a continuing series of violations; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; 5) from which he derives substantial income or resources." *United States v. Hoyle*, 122 F.3d 48, 50, 326 U.S. App. D.C. 310 (D.C. Cir. 1997) (citation and quotation marks omitted). A "continuing series of violations," 21 U.S.C. § 848(c)(2), requires participation in three or more predicate offenses, one of which may be a drug conspiracy charged under 21 U.S.C. § 846. *See United States v. Harris*, 959 F.2d 246, 252-54, 294 U.S. App. D.C. 300 (D.C. Cir. 1992), *overruled on other grounds, Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995); *see also* Dec. 9, 2002 AM Trial Tr. at 120. The jury convicted Moore upon finding seven proven predicate offenses. Moore challenges his CCE conviction on the ground that there was insufficient evidence to support the jury's finding of three or more predicate offenses. This court "must accept the jury's guilty verdict" where a rational trier of fact could have reasonably found that Moore committed at least three predicate offenses. *United States v. Dykes*, 406 F.3d 717, 721, 365 U.S. App. D.C. 381 (D.C. Cir. 2005).

The predicate offenses found by the jury included (1) the drug conspiracy charged in Count 1, *see* 21 U.S.C. § 846; (2) Gray's possession with intent to distribute cocaine base on October 5, 1996 (Count 1, Overt Act 78); and (3) Raynor's possession with intent to distribute heroin on February 8, 1997 (Count 1, Overt Act 90). The latter two were attributable to Moore as a co-conspirator pursuant to *Pinkerton v. United States*, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946): "As long as a substantive offense was done in furtherance of the conspiracy, and was reasonably foreseeable as a 'necessary or natural consequence of the unlawful agreement,' then a conspirator will be held vicariously liable for the offense committed by his or her co-conspirators." *United States v. Washington*, 106 F.3d 983, 1012, 323 U.S. App. D.C. 175 (D.C. Cir. 1997) (quoting *Pinkerton*, 328 U.S. at 647-648); *see also United States v. Baker*, 432 F.3d 1189, 1235 (11th Cir. 2005); *United States v. Hoover*, 246 F.3d 1054, 1057-58 (7th Cir. 2001).

Moore's challenge to these CCE predicate offenses rests on his contention that the charged conspiracy terminated before the statute of limitations period, when it split into separate conspiracies operating in different quadrants of the city more than five years prior to the filing of the superseding indictment. It follows, Moore maintains, that the government's failure to prove the charged conspiracy negates the jury's finding that these CCE predicate offenses were proven beyond a reasonable doubt. Moore suggests his conviction for the Count 1 drug conspiracy would be vacated and he would not be vicariously liable under *Pinkerton* for Gray's and Raynor's acts because there was no charged conspiracy to be furthered. *See Washington*, 106 F.3d at 1012. Because we conclude that Moore and Gray jointly led the charged drug conspiracy within the limitations period, *see supra* Part VII, and Moore identifies no other grounds for disturbing the jury's verdicts as to these CCE predicate offenses, such as challenging the sufficiency of evidence that Gray and Raynor committed these Count 1 overt acts, they are properly considered CCE predicate offenses.

Accordingly, Moore's challenge to the jury's finding of these Count 1 CCE predicate offenses fails.[19]

## XVI.

The government and Moore agree that Moore's convictions for the felony murder and the premeditated murder of Ronald Powell merge. We therefore vacate Moore's felony murder conviction for the murder of Powell.

## XVII.

The jury convicted Smith of murdering Eric Moore. During the initial police investigation of Moore's murder, another man, Antoine Ward, claimed to have killed Moore. Smith argues that the district court improperly excluded evidence of Ward's confession. We conclude that the district court did not abuse its discretion in excluding the Ward evidence.

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[19] Any violation of the Confrontation Clause in admitting the DEA chemist report certifying the substance possessed by Raynor to be heroin, *see supra* Part IX, is rendered harmless beyond a reasonable doubt by Raynor's guilty plea to Overt Act 90, *see* Oct. 7, 2002 Trial Tr. at 131-33; *see also Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Eric Moore was found shot to death in his bedroom closet, with a pillow on the floor nearby and the room ransacked. At trial, a government witness testified: that he drove Smith and an accomplice to Moore's apartment with the intent of robbing Moore; that Smith was carrying a handgun; that Smith and the accomplice returned from Moore's apartment carrying bags of clothes; and that Smith told the witness he had shot Moore in Moore's closet after placing a pillow over Moore's head to muffle the sound. Another government witness testified that Smith had confirmed those details in a conversation with the government witness.

Before the above evidence came to light, the police had found a fingerprint belonging to Ward in Eric Moore's apartment. Ward therefore became the first target of the police investigation into this murder. When questioned, Ward admitted that he knew Moore and initially claimed that he participated in Moore's robbery with three other men, one of whom killed Moore. Ward later altered his story, naming a different person as the murderer. Still later, Ward changed his account entirely, claiming that he killed Moore himself during an argument, and denying that any others were involved. Then, in his fourth and last statement, Ward recanted his previous three accounts and denied any involvement in Moore's robbery or death. The government did not pursue charges against Ward because it did not find sufficient evidence to corroborate his involvement.

Ward's counsel informed the government that Ward would invoke his Fifth Amendment right against self-incrimination if called to testify at Smith's trial. Smith claims that the district court should have told the government to immunize Ward for purposes of testifying, and if the government refused, dismissed the charges against Smith.

But the district court had no authority to immunize Ward, or to compel the government to immunize Ward. The decision to grant immunity from prosecution rests solely with the Executive Branch. *See* 18 U.S.C. § 6003; *United States v. Doe*, 465 U.S. 605, 616-17, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984) ("Congress expressly left this decision exclusively to the Justice Department.").

Smith contends that the district court should have dismissed the murder charge against Smith because the government refused to immunize Ward, citing the D.C. Court of Appeals' decision in *Carter v. United States*, 684 A.2d 331, 339-46 (D.C. 1996) (en banc). *Carter* allows trial courts to impose sanctions on the prosecution — including dismissal of charges — if the prosecution creates a "distortion of the fact-finding process" by unjustifiably refusing to grant immunity to a defense witness. *Id.* at 342-43. Even assuming that *Carter* applies here (given that Smith was charged with murder under the D.C. Code), the district court did everything that the *Carter* decision would require: The government had interviewed Ward when it investigated him, and decided not to grant him immunity because Ward's accounts were self-contradictory and likely to result in perjury. The district court accepted that as a valid reason for the prosecution not to immunize Ward, and declined to impose sanctions on the prosecution. The district court's decision was well within the bounds of *Carter*. *Cf. Butler v. United States*, 890 A.2d 181, 190 (D.C. 2006); *Carter*, 684 A.2d at 342-43.

Smith also argues that the district court should have admitted into evidence the third of Ward's four contradictory statements regarding Eric Moore's murder, the statement in which Ward claimed to have killed Moore.

Ward's confession is hearsay, but under Federal Rule of Evidence 804(b)(3) such hearsay was admissible if: (1) the declarant was unavailable, (2) the statement was against the declarant's interest, and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement."[20] The party offering the statement bears the burden of establishing that the statement meets these requirements. *See United States v. Jackson*, 540 F.3d 578, 588 (7th Cir. 2008); *United States v. MacDonald*, 688 F.2d 224, 233 (4th Cir. 1982).

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[20] Under the version of Rule 804(b)(3) in effect during Smith's trial, the requirement for clear corroboration only applied to statements, such as Ward's, "tending to expose the declarant to criminal liability and offered to exculpate the accused." That portion of the rule was amended in 2010. The new text applies to any statement "offered in a criminal case as one that tends to expose the declarant to criminal liability." Fed. R. Evid. 804(b)(3) (2011). That change is not relevant here; both versions of the rule apply to Ward's statement. The 2010 amendment broadened the rule so that it applies to statements against penal interest offered by the prosecution as well as statements offered by the defense (such as Ward's confession here). *See* Fed. R. Evid. 804(b)(3) advisory committee's note to 2010 amendments.

There is no dispute that Ward was unavailable because he had invoked his Fifth Amendment right against self-incrimination. There is also no dispute that Ward's confession to killing Eric Moore is a statement against his interest. The issue here is thus whether corroborating circumstances "*clearly* indicate" the trustworthiness of Ward's statement. Fed. R. Evid. 804(b)(3) (emphasis added).

Rule 804(b)(3)'s standard is demanding. The requirement for clear indications of trustworthiness serves to prevent someone whose reliability cannot be tested by cross-examination (such as Ward) from exonerating a guilty party by incriminating himself. The rule thus contemplates that some out-of-court admissions of guilt will be excluded, despite their relevance, because they possess insufficient indications of trustworthiness. *See United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987); *United States v. Silverstein*, 732 F.2d 1338, 1346-47 (7th Cir. 1984); *MacDonald*, 688 F.2d at 233; *see also United States v. Edelin*, 996 F.2d 1238, 1241-42, 302 U.S. App. D.C. 159 (D.C. Cir. 1993).

Smith's argument that Ward's confession is "clearly" corroborated for purposes of Rule 804(b)(3) rests largely on general facts that do not directly confirm Ward's claim to have killed Eric Moore. Ward's fingerprint proves that Ward was in Moore's apartment at some point. But in his statement, Ward claimed that he was in an ongoing romantic relationship with Moore and regularly stayed with him. The fingerprint thus does not corroborate Ward's claim that he was present during the murder, much less that he committed it. Smith's other examples of corroborating evidence suffer from similar problems: Evidence tending to demonstrate that Ward knew certain things about Moore only corroborate Ward's claim that he knew Moore, not that he killed him.

Against those general facts, Smith must deal with the fact that Ward contradicted his statement multiple times. Ward made four separate statements to police regarding Eric Moore's death. In three of those four statements, Ward denied killing Moore. Moreover, the details of Ward's story vary significantly in each of the four accounts he gave, and he denied killing Moore both before and after claiming that he did. Other circuits have held that such contradictions can alone render an otherwise admissible statement untrustworthy. *See United States v. Jackson*, 540 F.3d 578, 589-90 (7th Cir. 2008); *United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir. 1999); *see also United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (listing consistency of declarant's statements as a factor in assessing trustworthiness under Rule 804(b)(3)).

Under the deferential abuse of discretion standard, we cannot conclude that the district court erred in excluding Ward's statement. Rule 804(b)(3)'s requirement to show clear indications of trustworthiness is a strict one. On three separate occasions, Ward contradicted his claim to have killed Eric Moore. Under those circumstances, the general corroboration advanced by Smith was not so clear that we can say that the district court abused its discretion in excluding Ward's hearsay confession.

## XVIII.

Smith also challenges the sufficiency of the evidence supporting his conviction for the murder of Anthony Dent. We have little trouble concluding that the evidence sufficed for a rational jury to find Smith's guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The government alleged that Smith assisted Moore and Gray in murdering Dent because Dent was delinquent in a debt to Moore. The government presented testimony from two witnesses who observed the circumstances of Dent's murder. Both witnesses saw Smith, Gray, and Moore searching Dent's block prior to the murder. The first witness testified that Moore, while in Smith's company, asked the witness where to find Dent. The first witness also noted that Smith and Gray were wearing dark clothes when the witness spoke with Moore. The second witness saw a single person in dark clothes shoot Dent, but could not see the shooter's face. The second witness also saw Smith, Gray, and Moore in the vicinity of the murder soon after the killing occurred.

The second witness also related a conversation that occurred years after the murder, when that witness had himself become a lieutenant to Gray. According to the second witness, Gray stated that Moore had agreed to pay $5,000 for Dent's murder. Gray told the witness that while Smith, Gray, and Moore searched for Dent, Smith argued with Gray over who would actually shoot Dent and receive the $5,000. Gray apparently won the argument, and, after locating Dent with Smith and Moore's help, killed Dent.

The eyewitness testimony of both witnesses placed Smith at the scene of the murder, working with his fellow murderers to locate their victim and acting as a lookout during the murder. The second witness's report of the later Gray conversation provided evidence that Smith knew the purpose of the search was to kill Dent and that Smith intended to bring about that result. That evidence is sufficient to support Smith's conviction. *Cf. United States v. Wilson*, 160 F.3d 732, 737-39, 333 U.S. App. D.C. 103 (D.C. Cir. 1998).

Smith's challenges to this evidence are unavailing. He suggests alternate explanations of the eyewitness testimony and an alternate theory of the crime, but on sufficiency of the evidence review we must view the evidence in the light most favorable to the government. *See United States v. Alexander*, 331 F.3d 116, 127, 356 U.S. App. D.C. 299 (D.C. Cir. 2003). Smith also objects that the testimony of accomplices is unreliable (both government witnesses had been drug dealers in the Moore and Gray organization), but in this Circuit accomplice testimony alone can support a conviction. *See United States v. Lee*, 506 F.2d 111, 118, 165 U.S. App. D.C. 50 (D.C. Cir. 1974). And Smith objects to the admission of the second witness's later conversation with Gray, but this court "must consider all admitted evidence — whether admitted erroneously or not — in reviewing the sufficiency of the evidence." *Alexander*, 331 F.3d at 128 (citing *Lockhart v. Nelson*, 488 U.S. 33, 39-42, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988)).[21]

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[21] Even if we construed Smith's argument against admission of the Gray conversation as a separate argument under the Federal Rules of Evidence, that argument would fail. Under Federal

We therefore reject Smith's challenge to his conviction for the murder of Anthony Dent.

## XIX.

Somewhat as a corollary to his sufficiency of evidence challenge as regards his conviction for the murder of Anthony Dent, Smith contends that his trial counsel failed to provide constitutionally adequate assistance in electing not to call Leo Benbow as a witness. Benbow, according to Smith, witnessed Dent's murder and would have identified Clayton Thomas as the shooter.

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficiency "the defendant must show that counsel's representation fell below an

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Rule of Evidence 801(d)(2)(E), admissions "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. When Gray gave his account of the murder to the government witness, that witness was Gray's assistant and thus a member of the conspiracy. Contrary to Smith's argument, Smith also remained a member of the conspiracy at the time of this conversation. *See infra* Part XX (Smith's claim to have withdrawn from the conspiracy fails). And this court has held that recounting past violent acts to members of a violent gang is a statement in furtherance of the conspiracy because it provides useful information on the conspiracy's activities and motivates conspiracy members' continued participation. *See United States v. Carson*, 455 F.3d 336, 367, 372 U.S. App. D.C. 251 (D.C. Cir. 2006).

objective standard of reasonableness," *id.* at 688; to establish prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" *id.* at 694. *See also Porter v. McCollum*, 130 S. Ct. 447, 452, 175 L. Ed. 2d 398 (2009). This court typically remands an ineffective assistance of counsel claim raised for the first time on direct appeal to the district court for an evidentiary hearing "unless the trial record alone conclusively shows that the defendant either is or is not entitled to relief," *United States v. Shabban*, 612 F.3d 693, 698, 391 U.S. App. D.C. 408 (D.C. Cir. 2010) (citation and quotation marks omitted), and provided that the defendant has raised a "colorable claim" by making "factual allegations that, if true, would establish a violation of his sixth amendment right to counsel," *United States v. Burroughs*, 613 F.3d 233, 238, 392 U.S. App. D.C. 68 (D.C. Cir. 2010) (citation and quotation marks omitted).

There was sufficient evidence upon which the jury reasonably could find that Smith aided and abetted Gray in murdering Dent. *See supra* Part XVIII. Smith defended against this charge at trial by offering evidence, pursuant to *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc); *see also United States v. Wilson*, 160 F.3d 732, 742-43, 333 U.S. App. D.C. 103 (D.C. Cir. 1998), that Thomas, a third party with whom Smith had no affiliation, committed the crime. An understanding of how that defense unfolded at trial and the context in which Smith's counsel chose not to call Benbow to testify requires some background.

During opening statements, Smith's counsel forecasted to the jury that, as to the murder of Dent, "you will find that there is an eyewitness that identified other people and not Calvin Smith as being present and involved." May 13, 2002 AM Trial Tr. at 92. As groundwork for this defense, Smith introduced expert testimony that bullets fired from a gun used in the attempted murder of Michael Taylor were "tantalizingly close to being a perfect match" to those collected following Dent's murder a day later. Nov. 12, 2002 AM Trial Tr. at 33. The expert opined that it was "likely" the bullets were fired from the same pistol. *Id.* at 34. Building on this connection between the Taylor and Dent shootings, which occurred at the same location, *see* Nov. 14, 2002 PM Trial Tr. at 124; *see also* Counts 4-5, Superseding Indict. at 104-05, Smith intended to establish, through identifications made by Taylor and Benbow, that Thomas and two others, neither of them Smith, were involved in both crimes. *See* Nov. 14, 2002 PM Trial Tr. at 76.

Before any witnesses were called as to the identifications, the prosecutor advised the district court that the government's response to Smith's third-party defense might cause a potential issue to arise under *Bruton v. United States*, 391 U.S. 123, 127-28, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), which held that a defendant's Sixth Amendment right to cross-examination is violated when, in a joint trial, a non-testifying defendant's out-of-court admission is introduced against a codefendant. The prosecutor explained that one of the assailants identified by both Taylor and Benbow was a tall man named Rodney, who the government believed to be charged conspiracy co-principal Rodney Moore, and therefore the prosecutor would seek the identification of all three assailants on cross-examination of Benbow and other fact witnesses. *See* Nov. 14, 2002 PM Trial Tr. at 76. Counsel for Moore appeared to agree regarding the *Bruton* problem, stating that "given [the government's] proffer . . . [t]his could really come back and bite us," but demurred when pressed by the district court to articulate the concern. *Id.* at 81-82.

The evidence concerning Taylor's identification of Thomas as one of his assailants consisted of testimony by two D.C. police officers who investigated the incident. Officer Will stated that the attempted murder occurred on "October 8 of 1990, [in the] 3100 block of 15th Place, Southeast, late evening," that he directed Detective Fluck to show photographs to Taylor for purposes of identifying the perpetrator, and that ultimately an arrest warrant was issued for Thomas. Nov. 14, 2002 PM Trial Tr. at 84. Detective Fluck, in turn, recounted visiting Taylor in the hospital to do a "photo spread," prompting the prosecutor to object to the admission of an out-of-court identification by Taylor. *See id.* at 86. Following a colloquy at the bench, the district court sustained the objection, thereby limiting the direct examination of Detective Fluck to the fact that an identification was made by Taylor, without revealing the name of the person (Thomas) identified. *See id.* at 86-89, 91. Detective Fluck testified on direct examination in accordance with the ruling.

Before cross-examination of Detective Fluck, however, the prosecutor noted that the direct examination had resulted in an "incomplete accounting of what Mr. Taylor said" to Detective Fluck insofar as "Mr. Taylor actually talked about three people being involved in the shooting." *Id.* at 97. Consequently, the prosecutor indicated his intent "to flesh out all of the identification," including the fact that a man named Rodney was involved. *Id.* at 97-98. The district court, likely mindful the prosecutor had raised the specter of a *Bruton* problem, inquired whether the prosecutor could "sanitize" the cross-examination and avoid a *Bruton* problem by "[a]sk[ing] the officer if it is true . . . that Mr. Taylor also identified other individuals." *Id.* at 98. In response, however, the prosecutor stated that he "d[idn't] think it is a Brut[]on problem, because it isn't a defendant testifying against another defendant. I think that's the Brut[]on line [of authority], essentially limited to a defendant testifying against another." *Id.* The district court directed the prosecutor to sanitize the cross-examination. *Id.* at 99. The parties and the district court then engaged in the following exchange, which is central to Smith's allegation of constitutionally inadequate counsel:

> Moore's Counsel: I do just want to note a concern that even that sanitized testimony, when viewed together within the testimony of what I'm told to anticipate from — the next witness may provide — could present a very serious continuing Brut[]on type problem for us.
>
> The Court: What is next?
>
> Smith's Counsel: Your Honor, I'll be frank with the Court. It is not my intention to call Benbow to go into the Dent shooting.

> *If I did, I think we would have a mistrial.*
>
> * * *
>
> I will tell the Court that the government is free to call Benbow. They know where he is. He's out there in the witness program. If they choose. They want to open up this can of worms, they're free to do that.
>
> But I won't be introducing it, based on the limited ability of myself and my limited ability to go into this through these two officers. Severely hamstrung. First of all, I'm missing photographs that I can't go into with Benbow because they're not in the jacket. They're missing the photographs from [Dent] and Michael Taylor.

The Court: Look, I can't solve all the problems of the whole'case here. Let's finish this witness. Do what I suggested.

*Id.* at 99-100 (emphasis added). Proceeding in this sanitized manner, the prosecutor elicited from Detective Fluck that, according to Taylor, "Thomas was one of three men who shot [Taylor]" and that "there were three men, all of whom were firing at [Taylor] at the same time." *Id.* at 101-02.

Based on the foregoing, we conclude that Smith has made a "colorable claim" that his counsel's decision not to call Benbow to testify was constitutionally deficient, and that he was prejudiced by his counsel's conduct. *See Burroughs*, 613 F.3d at 238. First, Smith has made a plausible claim that his counsel's decision not to call Benbow to testify fell below an objective standard of reasonableness. Why Smith's counsel believed that calling Benbow would precipitate a mistrial, *see* Nov. 14, 2002 PM Trial Tr. at 99, and how the district court's evidentiary rulings or other circumstances "[s]everely hamstrung" the presentation of the third-party defense, *id.* at 100, is difficult to discern from the current record. *Bruton* applies only where, unlike here, there is an "admission of incriminating out-of-court statements made by a nontestifying *codefendant*," *United States v. Wilson*, 605 F.3d 985, 1017, 390 U.S. App. D.C. 368 (D.C. Cir. 2010) (emphasis added), which Benbow was not. Moreover, although Smith's counsel was unable to elicit Taylor's identification of Thomas on direct examination of Detective Fluck, the jury could infer this fact from the issuance of an arrest warrant for Thomas and, in any event, Thomas was ultimately identified during the prosecutor's cross-examination of Detective Fluck.

The parties' briefs discuss at length whether the government could have proved that the "Rodney" who purportedly participated in the Taylor shooting was Rodney Moore, and, if so, whether this factored into defense counsel's decision not to call Benbow. The government suggests that "[t]he possibility that Benbow would implicate Moore in one or both shootings would have prejudiced Moore, but more importantly, it would also have had a direct prejudicial impact on Smith's *own* defense," Appellee's Br. at 276, insofar as the government had introduced evidence in its case-in-chief that Moore, Gray, and Smith were searching for Dent shortly before the shooting, *see* May 21, 2002 AM Trial Tr. at 137 38. The current record, however, is inconclusive as to whether the allegations "reflect the trial counsel's informed tactical choice or a decision undertaken out of ignorance of the relevant law." *United States v. Reeves*, 586 F.3d 20, 26, 388 U.S. App. D.C. 295 (D.C. Cir. 2009) (citation and quotation marks omitted). Similarly, Smith's assertion that his counsel erroneously believed there was a *Bruton* problem fails to find conclusive support in the current record. *See id.*

Second, the extent to which an error, if any, prejudiced Smith's third-party defense is also unclear from the current record. The lack of clarity stems in part from an inability to pin down the precise nature of Benbow's testimony. In his brief, Smith proffers that Benbow would have testified: "[I] saw three men — Smith not being one of them — kill Dent." Appellants' Br. at 275. According to Smith, Benbow's eyewitness account of the Dent murder would have changed the course of the trial in light of the weak circumstantial evidence offered against Smith, thereby implicating Thomas and fully exonerating Smith of participating in the crime. The government disagrees, maintaining that the absence of Benbow's testimony was insufficient to satisfy the second *Strickland* prong because the evidence would not have been exculpatory of Smith. Recall that Smith, Gray, and Moore were seen together near the scene of the Dent murder shortly before and after it occurred and that the government introduced evidence to establish that Smith served as a lookout from an alley for Gray, the shooter. *See supra* Part XVIII. From this, the government concludes that Benbow's account of the Dent murder does not rule out Smith's participation because Benbow would not have seen Smith hiding in the alley. This may or may not be so, depending on a number of variables.

Benbow's proffered testimony ("[I] saw three men — Smith not being one of them — kill Dent") is subject to varying interpretations. On the one hand, it may be that Benbow saw three men simultaneously shoot at Dent, none of them Smith, and that Benbow was in a position to confirm that Smith was not standing in the alley. Smith was not completely hidden from view since Sanders was able to identify him. *See* May 21, 2002 AM Trial Tr. at 140, 142. On the other hand, in stating that three men "kill[ed] Dent," Benbow might have meant that three men participated in the murder, one of whom was the shooter and two of whom served as lookouts. Such a statement could be exculpatory of Smith depending on where the lookouts were standing and, again, if Benbow were in a position to see into the alley. The trial record does not make clear which interpretation is correct. *Compare* Nov. 14, 2002 PM Trial Tr. at 76 ("Benbow . . . identified three people being *involved* in both shootings . . . ." (emphasis added)), *with id.* at 124 ("Clayton Thomas is identified both in [Dent] and in the Michael Taylor [shootings] as being the *one* that shot." (emphasis added)), *with id.* at 125 ("Thomas is identified as *one of the three* shooters." (emphasis added)).

The current record also does not allow a conclusive determination that Benbow's testimony was immaterial or cumulative such that it defeats a colorable prejudice claim. *See United States v. Toms*, 396 F.3d 427, 434-35, 364 U.S. App. D.C. 397 (D.C. Cir. 2005). The jury heard fact testimony that Taylor identified Thomas as a person who shot at him, *see* Nov. 14, 2002 PM Trial Tr. at 101-02, and expert opinion testimony that the bullets fired at Taylor and Dent were "tantalizingly close to being a perfect match," Nov. 12, 2002 AM Trial Tr. at 33. Benbow would have provided corroboration for Smith's third-party defense insofar as he witnessed Thomas shoot Dent, thereby strengthening the connection between Thomas and the two shootings. This evidence would not have been cumulative. It is conceivable that Smith could have pursued his defense based solely on Taylor's identification of Thomas in the first shooting and the similarity in the bullet markings between the shootings, but there was no other evidence in the record linking Thomas directly to Dent's murder. *See Sussman v. Jenkins*, 636 F.3d 329, 358-59 (7th Cir. 2011). Notably, Benbow would have provided the only eyewitness identification of the shooter at the scene. *See Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007). *But cf. United States v. McNeil*, 911 F.2d 768, 774, 286 U.S. App. D.C. 26 (D.C. Cir. 1990). Without Benbow's eyewitness account of the Dent murder and identification of Thomas, the jury was left to infer from Smith's evidence that Thomas shot Dent and to weigh this inference against the testimony of government witnesses that Gray, with Smith's assistance, committed the murder and later claimed credit for it.

The government's theory at trial was that Gray murdered Dent while Smith served as a lookout. Smith's defense was that Thomas and his cohort murdered Dent. No evidence linked the two groups; there was only the government's conjecture that one of Thomas's accomplices, identified as "Rodney," was in fact Rodney Moore. There is a "colorable" argument that Benbow's testimony would not have precipitated a mistrial or hampered Smith's defense, yet would have significantly altered the balance of evidence, tipping the scales in Smith's favor. *See Porter*, 130 S. Ct. at 455-56; *Strickland*, 466 U.S. at 693-94. Accordingly, because the current record does not conclusively resolve Smith's claim, we remand Smith's "colorable claim" of ineffective assistance of counsel under the Sixth Amendment to the district court so that it may hold an evidentiary hearing and address this claim in the first instance.

## XX.

In its instructions to the jury prior to deliberation, the district court explained: "If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before . . . May 5th, 2000 for defendant Calvin Smith . . . you must find the defendant[] not guilty of Count One." Dec. 9, 2002 AM Trial Tr. at 104-05. After deliberating for nearly 12 days, the jury asked the court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" Over appellants' objections, the district court told the jury that "[o]nce the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence."

Smith contends that the district court erred in instructing the jury that he rather than the government bore the burden of persuasion to show that he had withdrawn from the conspiracy. He believes that, because he met his burden of production to show that he withdrew from the charged conspiracy prior to the relevant statute of limitations period, due process required the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

In a criminal trial due process requires the government to prove beyond a reasonable doubt all elements of the offense. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *see also Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006); *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). As a consequence, when a defendant raises (by meeting his burden of production) a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense. *See Dixon*, 548 U.S. at 11 ("We require[] the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence that tended to prove insanity also tended to disprove an essential element of the offense charged." (citing *Davis v. United States*, 165 U.S. 373, 378, 17 S. Ct. 360, 41 L. Ed. 750 (1897))).

Conspiracy is a crime that presumes continuity until accomplishment or termination; once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends. *Hyde v. United States*, 225 U.S. 347, 368-70, 32 S. Ct. 793, 56 L. Ed. 1114 (1912). Therefore, once the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws. The question here then is whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of the conspiracy such that the government must prove that the defendant did not so withdraw.

Our sister circuits have differed on this issue. While some have said that the burden of proving withdrawal always rests on the defendant, *see, e.g., United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008); *United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005); *United States v. Brown*, 332 F.3d 363, 374 (6th Cir. 2003); *United States v. Hughes*, 191 F.3d 1317, 1322 (10th Cir. 1999); *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996), others have held that, once the defendant meets his burden of production that he has withdrawn prior to the relevant limitations period, the burden of persuasion shifts to the government, *see, e.g., United States v. Read*, 658 F.2d 1225, 1232-33 (7th Cir. 1981); *United States v. Antar*, 53 F.3d 568, 582-83 (3d Cir. 1995), *abrogated on other grounds by Smith v. Berg*, 247 F.3d 532 (3d. Cir. 2001); *United States v. Lothian*, 976 F.2d 1257, 1261-62 (9th Cir. 1992); *United States v. West*, 877 F.2d 281, 289

(4th Cir. 1989); *United States v. Dyer*, 821 F.2d 35, 39 (1st Cir. 1987).

Our circuit, however, does not write on a blank slate. We previously have said unequivocally, albeit in the context of sentencing, that the defendant, not the government, "has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement." *United States v. Thomas*, 114 F.3d 228, 268, 324 U.S. App. D.C. 374 (D.C. Cir. 1997); *see also United States v. Mitchell*, 49 F.3d 769, 784, 311 U.S. App. D.C. 35 (D.C. Cir. 1995); *United States v. Dale*, 991 F.2d 819, 854, 301 U.S. App. D.C. 110 (D.C. Cir. 1993). We are obliged to follow our precedent, and we thus hold that the district court correctly instructed the jury that the defendant bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period.

## XXI.

Smith and Raynor were convicted of killing in furtherance of a continuing criminal enterprise, 21 U.S.C. § 848(e)(1)(A) (2000), murder in aid of racketeering, 18 U.S.C. § 1959, and first-degree murder under D.C. Code § 22-2401 (1981) (current version at D.C. Code § 22-2101). *See also* 18 U.S.C. § 2 (aiding and abetting); D.C. Code § 22-105 (1981) (current version at D.C. Code § 22-1805) (same). The murders were committed by other members of the charged conspiracy, with Smith or Raynor participating. With regard to the principles of liability, the district court instructed the jury that "[a]n aider and abettor is legally responsible for the acts of other persons that are the *natural and probable consequences* of the crime in which he intentionally participates." Dec. 9, 2002 AM Trial Tr. at 95 (emphasis added).

Smith and Raynor challenge their federal and D.C. murder convictions on the ground that the "natural and probable consequences" formulation of the aiding and abetting instruction permitted the jury to render a guilty verdict without requiring the government to prove beyond a reasonable doubt that Smith and Raynor acted with the requisite specific intent to kill. Because they did not raise this objection in the district court, our review is for plain error. *See United States v. Wilson*, 605 F.3d 985, 1020, 390 U.S. App. D.C. 368 (D.C. Cir. 2010). To prevail Smith and Raynor must therefore identify a legal error that was "plain," meaning "clear" or "obvious," and demonstrate that such error affected substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732-37, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (citation and quotation marks omitted). "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal . . . [,] it is enough that an error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

For the following reasons we conclude that even assuming error by the district court in using the "natural and probable consequences" instruction for the aiding and abetting charges, given the forfeiture of an argument by

Smith and Raynor, the error was not prejudicial in view of the district court's instruction on co-conspirator liability for acts reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *See Pinkerton v. United States*, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

With respect to the first-degree murder convictions under the D.C. Code, *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (en banc), controls. There, the D.C. Court of Appeals reversed a conviction for first-degree premeditated murder while armed, in violation of D.C. Code § 22-2401, because the "natural and probable consequences" aiding and abetting instruction "omitted the *mens rea* element of the offense charged," namely "premeditation, deliberation, and intent to kill." *Id.* at 822. The court rejected the "natural and probable consequences" formulation because its use was at odds with the longstanding requirement that an accomplice "knowingly associate[] herself with the commission of the crime, that she participate[] in the crime as something she wished to bring about, and that she intended by her actions to make it succeed." *Id.* at 835. To hold otherwise, the court reasoned, "would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind," *id.* at 837, and eviscerate the distinction between traditional first-degree murder and the unique foreseeability test of felony murder, *see id.* at 838-39. The government concedes as regards Smith's and Raynor's first-degree murder convictions under the D.C. Code that the district court's use of the "necessary and probable consequences" instruction was plain error. *See Perez v. United States*, 968 A.2d 39, 93 (D.C. 2009).

With regard to the CCE and RICO murder convictions under the U.S. Code, this court in reversing the aiding and abetting conviction in *United States v. Wilson*, 160 F.3d 732, 333 U.S. App. D.C. 103 (D.C. Cir. 1998), held that aiding and abetting liability requires proof of some shared intent by the aider and abettor with that of the principal actor. There, the jury convicted Ralph and Louis Wilson of a conspiracy to kill a witness named Leroy Copeland, killing a witness with intent to prevent him from testifying, both in violation of the U.S. Code, and first-degree murder while armed in violation of the D.C. Code. In addition, the jury found Marcellus Judd guilty of these crimes as an aider and abettor for his role in informing the Wilsons that Copeland could be found nearby. An aiding and abetting conviction required proof that Judd had: "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge (3) that the other was committing an offense; and (4) assisting or participating in the commission of the offense." *United States v. Gaviria*, 116 F.3d 1498, 1535, 325 U.S. App. D.C. 322 (D.C. Cir. 1997). In concluding that there was insufficient evidence to convict Judd as an aider and abettor, this court reasoned:

> To prove aiding and abetting the government must show that Judd shared some intent with the Wilson brothers and took some affirmative action to assist them in carrying out their plan to kill Copeland. *See Gaviria*, 116 F.3d at 1535. Although the intent of the aider and abettor need not be identical to that of the principal, *see United States v. Walker*, 99 F.3d 439, 442, 321 U.S. App. D.C. 300 (D.C. Cir. 1996), the government still was required to show that

> Judd had sufficient knowledge and participation to allow a reasonable juror to infer that he "knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed." *Teffera*, 985 F.2d at 1086 (quoting *United States v. Raper*, 676 F.2d 841, 849, 219 U.S. App. D.C. 243 (D.C. Cir. 1982)).

*Wilson*, 160 F.3d at 738. Evidence that Judd knew the Wilsons were looking for Copeland was insufficient to show that he knew the Wilsons were intending to kill Copeland and that he had decided to assist them in that enterprise. *See id.*

The shared-intent standard for aiding and abetting in a conspiracy case is at odds with the "natural and probable consequences formulation" of the aiding and abetting instruction insofar as the jury may substitute a foreseeability test for the *mens rea* requirement. Such use of the "natural and probable consequences" formulation functionally transforms aiding and abetting liability into conspiratorial liability, when the Supreme Court has recognized the two are distinct. *Nye & Nissen v. United States*, 336 U.S. 613, 620, 69 S. Ct. 766, 93 L. Ed. 919 (1949) ("Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy."); *see id.* at 630 (Murphy, J., dissenting) (the former involving "real participation" and the latter "more remote plotting"); *accord Wilson-Bey*, 903 A.2d at 839-42. Appellants contend that the district court erred in instructing the jury with respect to the federal murder charges that "[a]n aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequences of the crime in which he intentionally participates." Dec. 9, 2002 AM Trial Tr. at 95. Although the above-referenced quote from *Wilson* might tend in appellants' direction, we note that the Supreme Court in 2007 cited *United States v. Walker*, 99 F.3d 439, 443, 321 U.S. App. D.C. 300 (D.C. Cir. 1996), in listing states and circuits that continue to apply the "'natural and probable consequences' doctrine." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190-91, 197, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007). Although the instructional issue was not raised in *Walker*, this court described the "natural and probable consequences" instruction with approval. *See* 99 F.3d at 443 (citing *United States v. Sampol*, 636 F.2d 621, 676, 204 U.S. App. D.C. 349 (D.C. Cir. 1980)). Fortunately, we need not resolve any actual or apparent conflict between *Walker* and *Wilson* in order to decide the present issue, because the plain error standard of review applies. We can hardly say the district court plainly erred by following the same construction of precedent as the Supreme Court. We further note that Smith and Raynor fail to show how any such error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (citation and quotation marks omitted). This is because the district court's co-conspirator liability instruction cured any prejudice.

As a threshold matter, Smith and Raynor cursorily contend that their murder convictions may not be sustained under this alternative theory of liability because it is impossible to know whether the jury arrived at its verdict by following the district court's aiding and abetting instruction or its *Pinkerton* instruction. They provide no citation for this argument, *see* Appellants' Br. at 303 n.167, and it is mentioned only in a footnote. Hence the argument is forfeited. *See Bush v. District of Columbia*, 595 F.3d 384, 388, 389 U.S. App. D.C. 227 (D.C. Cir. 2010) (citing FED. R. APP. P. 28(a)(9)(A)); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001, 382 U.S. App. D.C. 78 (D.C. Cir. 2008).[22]

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[22] We note, however, that the Supreme Court held in *Yates v. United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." The Court narrowed this holding in *Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), to situations in which one of the grounds upon which the jury could have reached its verdict was legally, as opposed to factually, inadequate. *See United States v. Johnson*, 216 F.3d 1162, 1165 n.2, 342 U.S. App. D.C. 319 (D.C. Cir. 2000). Although the prejudice inquiry might normally be cut short by application of the *Yates* rule where, as here, the challenge is to the legality of the aiding and abetting instruction, this court has suggested that review under the plain error standard, as opposed to the harmless error standard, in a *Yates* case "would significantly affect the way in which [the court] analyze[s] [the] appeal" to the extent there is overwhelming evidence to support the conviction under the proper jury instruction, but had no occasion to decide which was the appropriate standard. *United States v. Perkins*, 161 F.3d 66, 73-74, 333 U.S. App. D.C. 167 (D.C. Cir. 1998). Other circuits have held that *Yates* does not apply under the plain error standard because the burden of establishing harm is on the defendant. *See United States v. Hastings*, 134 F.3d 235, 242-44 (4th Cir. 1998); *see also United States v. Colvin*, 353 F.3d 569, 576-77 (7th Cir. 2003).

The D.C. Court of Appeals' post-*Wilson-Bey* decisions in *Wheeler v. United States*, 977 A.2d 973 (D.C. 2009), and *Neal v. United States*, 940 A.2d 101 (D.C. 2007), are instructive. In both cases, the court held that, despite an erroneous aiding and abetting instruction, a *Pinkerton* instruction preserved the convictions for a given crime because the jury, having convicted the aider and abettor of a charged conspiracy, could have found that the crime was foreseeable and committed in furtherance of the charged conspiracy. Smith and Raynor correctly respond that *Wheeler* concerned a conspiracy to commit a single overt act of murder, and the jury necessarily found that Wheeler acted with the specific intent to kill in convicting him of conspiracy to commit murder. 977 A.2d at 984. Here, by contrast, the conspiracy count contains 236 overt acts and such a conclusion cannot be drawn. But their argument misunderstands the relationship between the two types of liability and conflates the two alternative approaches taken in *Wheeler*. *See id.* It is true that a conviction for

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Here, for two reasons, we will assume without deciding that under plain error review *Yates* does not require Smith's and Raynor's murder convictions to be set aside even though we do not know whether the jury convicted for aiding and abetting or under *Pinkerton*. First, Smith and Raynor have forfeited the argument by citing no authority and by raising it in a footnote. *See Bush*, 595 F.3d at 388; *Am. Wildlands*, 530 F.3d at 1001. Second, Smith and Raynor shoulder the burden of demonstrating that instructional error prejudiced their defense under the plain error standard, *see* Appellants' Br. at 302, a position their counsel reiterated during oral argument, *see* Oral Arg. Tr. at 80.

conspiracy based on hundreds of possible overt acts does not permit the inference that the jury found the overt act murders to have been committed with the requisite intent. Such proof, however, is not required under the *Pinkerton* theory of liability. As the D.C. Court of Appeals explained in *Wheeler*:

> Under *Pinkerton* . . . the intent necessary for conviction of murder as an aider and abettor under *Wilson-Bey* yields to virtually the same state of mind — the lesser foreseeability or natural and probable consequences standard — found erroneous in the court's aiding-and-abetting instruction. In short, a conspiracy — an agreement not necessarily present among aiders and abettors — is deemed a *substitute* for the particular state of mind required for convicting a nonconspiratorial accomplice of murder under *Wilson-Bey*. A jury finding that Wheeler had the state of mind required for conviction of first-degree murder was therefore not necessary for conviction under the *Pinkerton* theory.

*Id.* at 985 (emphasis added); *accord United States v. Vazquez-Castro*, 640 F.3d 19, 24 (1st Cir. 2011). *Pinkerton* co-conspirator liability exists, moreover, even where the substantive offense is not an overt act alleged in the indictment. *See United States v. Washington*, 106 F.3d 983, 1011, 323 U.S. App. D.C. 175 (D.C. Cir. 1997). It requires only that the substantive offense be committed in furtherance of the conspiracy and reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. *See id.* at 1012. This is the relevant analysis here.

There was ample evidence for the jury reasonably to find that the murders for which Smith and Raynor were convicted were foreseeable and in furtherance of the charged conspiracy. Smith and Raynor's attempt to show otherwise is unpersuasive; they summarize the facts of each murder and claim either there was insufficient admissible evidence to support the murder conviction or there is no evidence establishing the murders were related to the conspiracy's dealings. As regards the former, those contentions are discussed and rejected elsewhere. *See supra* Part XVIII. As regards the latter, the superseding indictment and evidence at trial make clear that one of the principal goals of the drug conspiracy was killing to enhance the conspiracy's power, protect the reputation of the conspiracy and its members, and collect money owed to the conspiracy. *See* Superseding Indict. at 4-5. It was reasonable for the jury to find that each of the murders furthered one (if not more) of these goals. *See United States v. Carson*, 455 F.3d 336, 376, 372 U.S. App. D.C. 251 (D.C. Cir. 2006).

Accordingly, any error regarding the "natural and probable consequences" instruction did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 732 (citation and quotation marks omitted), because the evidence supports the jury's verdict on Smith's and Raynor's CCE, RICO, and first-degree murder convictions under the alternative *Pinkerton* theory of liability.

## XXII.

Following the government's proposal to try appellants together—in a trial separate from and prior to other charged co-conspirators—Nunn and Handy moved for severance of their trials from that of their codefendants. In a memorandum opinion, the district court denied Nunn's and Handy's motions, adopting the government's proposal to try all appellants in a single trial. *United States v. Gray*, 173 F. Supp. 2d 1 (D.D.C. 2001). Nunn and Handy argue on two bases that the district court erred by refusing to sever their trials. First, they argue that their codefendants were charged with more numerous and serious crimes, the evidence of which could have a "spillover" effect, akin to guilt-by-association, that would prejudice the jury against them. Second, they maintain that they should not have been forced to be tried alongside Moore and Gray, who were facing the death penalty, because it caused them prejudice to be tried by a death-qualified jury.

Rule 14(a) of the Federal Rules of Criminal Procedure provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." As is clear from the text of the rule, district courts have significant flexibility to determine how to remedy any potential risk of prejudice posed by the joinder of multiple defendants in a single trial. *See United States v. Lane*, 474 U.S. 438, 449 n.12, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986). Thus "Rule 14 does not require severance even if prejudice is shown," *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), and in many circumstances district courts may order lesser forms of relief to cure any prejudice. Indeed, although a district court may grant a severance in a wider array of circumstances, the Supreme Court has held that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. The Court has further explained that even "[w]hen the risk of prejudice is high, . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.*

We review the district court's decision not to sever the trials of defendants under Rule 14(a) only for abuse of discretion. *Id.* at 541; *United States v. Brown*, 16 F.3d 423, 426-27, 305 U.S. App. D.C. 1 (D.C. Cir. 1994). In reviewing the exercise of the district court's discretion, we keep in mind that "'[t]he balance has been struck in favor of joint trials.'" *United States v. Hines*, 455 F.2d 1317, 1334, 147 U.S. App. D.C. 249 (D.C. Cir. 1972) (alterations in original) (quoting *United States v. Krechevsky*, 291 F. Supp. 290, 294 (D. Conn. 1967)). We hold that the district court did not abuse its discretion when it declined to sever the trials of Handy and Nunn from that of the other appellants.

We turn first to the question of "spillover" prejudice: Acknowledging that it may prejudice a defendant to be tried together with another defendant accused of more serious or more numerous crimes, we have held that "severance is required when the evidence against one defendant is 'far more damaging' than the evidence against the moving party." *United States v. Bruner*, 657 F.2d 1278, 1290, 212 U.S. App. D.C. 36 (D.C. Cir. 1981) (quoting *United States v. Mardian*, 546 F.2d 973, 977, 178 U.S. App. D.C. 207 (D.C. Cir. 1976) (en banc)). However, "[a]bsent a *dramatic* disparity of evidence, any prejudice caused by joinder is best dealt with by instructions to the jury to give individual consideration to each defendant." *United States v. Slade*, 627 F.2d 293, 309, 200 U.S. App. D.C. 240 (D.C. Cir. 1980) (emphasis added). In other words, some disparity in evidence does not compel severance; rather, when there is "substantial and independent evidence of each [defendant's] significant involvement in the conspiracy," severance is not required. *United States v. Tarantino*, 846 F.2d 1384, 1399, 269 U.S. App. D.C. 398 (D.C. Cir. 1988); *see also Slade*, 627 F.2d at 310 (finding severance not required despite disparity in evidence because evidence against defendant was "independent and substantial").

In this case, although Handy and Nunn were alleged to have committed fewer crimes and arguably had a less extensive role in the charged conspiracy than the other defendants tried with them, the disparity of evidence did not rise to a level necessary to mandate severance. The government presented substantial and independent evidence of Handy's and Nunn's involvement in the charged conspiracy and crimes in furtherance thereof. Furthermore, the district court gave the following instruction to the jury:

> Unless I have instructed you otherwise, you should consider each instruction that the Court has given you to apply separately and individually to each defendant on trial. Likewise, you should give separate consideration and render separate verdicts with respect to each defendant. Each defendant is entitled to have his guilt or innocence of the crime for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. The guilt or innocence of any one defendant should not control or influence your verdict as to the other defendants. You may find any one or more of the defendants guilty or not guilty.
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> Dec. 9, 2002 AM Trial Tr. at 90.

Although we do not ignore the possibility that some "spillover" prejudice may have resulted to Handy and Nunn from being tried together with their codefendants, the district court's jury instructions, by explaining that each defendant's guilt should be considered individually based upon the evidence that pertained to him, were sufficient to cure any such prejudice.

Furthermore, Handy and Nunn were not entitled to severance merely because their guilt was adjudicated by a death-qualified jury. Facing a death-qualified jury did not "compromise a specific trial right" of Handy or Nunn. *Zafiro*, 506 U.S. at 539. Indeed, in *Buchanan v. Kentucky*, the Supreme Court made clear that trial before a death-qualified jury does not violate the constitutional rights of a noncapital defendant. 483 U.S. 402, 414-20, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). Neither did the death-qualification of the jury "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Implicit in the holding of *Buchanan* is the recognition that a death-qualified jury, no less than any other jury, is able to make a reliable judgment concerning guilt or innocence. To the extent appellants ask us to find that severance was required based only upon their allegation that death-qualified juries are more likely to convict than other juries, we may easily dispense with this argument as well. As the Supreme Court has explained, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 540. The district court acted within the appropriate bounds of its discretion in declining to sever Handy's and Nunn's trials from that of their codefendants.

## XXIII.

Next Handy contends that the district court erred in denying his motions for a new trial. Our review is for abuse of discretion unless the issue presented on appeal is purely legal, in which event our review is *de novo*. *See United States v. Oruche*, 484 F.3d 590, 595, 376 U.S. App. D.C. 92 (D.C. Cir. 2007).

Handy filed his first motion for a new trial following his conviction for participating in drug and RICO conspiracies and several other crimes involving narcotics, murder, obstruction of justice, and the use of firearms.

*See* Jan. 9, 2003 AM Trial Tr. at 55-59. He argued there was insufficient evidence of his guilt and that the district court erred in making various evidentiary rulings and in instructing the jury. The district court denied the motion, finding that there was sufficient evidence for a reasonable jury to conclude that Handy was a "hitman" for the conspiracy, which he joined in the mid-1990s, and rejecting his other claims of error. *See United States v. Gray*, 292 F. Supp. 2d 71, 90-91 (D.D.C. 2003). Handy filed his second motion for a new trial during the pendency of the subsequent, separate trial of other alleged co-conspirators. This time he argued that the government had unconstitutionally withheld exculpatory and impeachment evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny. The district court denied the motion, ruling that "the evidence is not at all exculpatory or impeaching" and "the withholding of the evidence did not prejudice Handy." *United States v. Handy*, No. 00-157, at 3-4 (D.D.C. Mar. 4, 2005).

On appeal, Handy raises only some of the arguments he made in his motions; only the sufficiency of evidence claims relating to Handy's entry into the conspiracy and the murders of Richard Simmons and Demetrius Green, and the *Brady* claim relating to the pretrial statements of Cheryl Pinkard, are properly presented. The remaining arguments (including those relating to Scorpio Phillips) are forfeited because Handy has presented unsupported narratives lacking citation to the record and relevant authority. *See Bush v. Dist. of Columbia*, 595 F.3d 384, 388, 389 U.S. App. D.C. 227 (D.C. Cir. 2010); *United States* *v. Hall*, 370 F.3d 1204, 1209 n.4, 361 U.S. App. D.C. 480 (D.C. Cir. 2004).

### A.

Handy's arguments regarding the sufficiency of evidence are unpersuasive. Handy maintains there was a fatal variance between the superseding indictment and the government's proof at trial regarding his entry into the conspiracy because none of the cooperating co-conspirators testified that Handy had agreed with them or with Gray or Moore to join the charged conspiracy in the mid-1990s or thereafter. Such direct evidence of agreement is not required, however; the jury may infer conspiratorial agreement from the circumstances and the defendant's knowledge. *See United States v. Childress*, 58 F.3d 693, 710, 313 U.S. App. D.C. 133 (D.C. Cir. 1995). The cooperating co-conspirators provided ample testimony upon which the jury reasonably could infer Handy's knowledge of, and agreement to join, the drug conspiracy in the mid-1990s, and as early as 1994. *See, e.g.*, May 21, 2002 AM Trial Tr. at 33-34; July 9, 2002 AM Trial Tr. at 53-54. For example, Maurice Andrews testified that Handy was a participant in a drug operation located in the Northeast quadrant of Washington, D.C., which Moore and Gray actively managed in 1995-1996. *See* July 9, 2002 PM Trial Tr. at 82-83; *supra* Part VII. Further, the continuity of Handy's participation through 1998-1999, *see* July 10, 2002 PM Trial Tr. at 71, undermines his contention that the evidence demonstrated at best a buyer-seller relationship, rather than membership in the conspiracy. *See United States v. Thomas*, 114 F.3d 228, 241, 324 U.S. App. D.C. 374 (D.C. Cir. 1997); *Childress*, 58 F.3d at 714.

With respect to the Richard Simmons murder, the superseding indictment did not inconsistently charge Handy with committing the murder in July 1997 to gain entrance to the conspiratorial enterprise while also alleging that he joined the charged conspiracy in the mid-1990s. An indictment may charge alternative means of committing a crime. *See United States v. Coughlin*, 610 F.3d 89, 106-07, 391 U.S. App. D.C. 278 & n.10 (D.C. Cir. 2010). The superseding indictment, tracking the text of the RICO violent crimes statute, charged Handy with murdering Simmons for the alternative reasons listed in the statute — "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value . . . or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a); *see also* Count 60, Superseding Indict. at 134. The jury reasonably could have found from the evidence that Handy committed the murder in exchange for money, *see* Oct. 16, 2002 AM Trial Tr. at 130-34, or to maintain his status as an enforcer, *see* July 9, 2002 AM Trial Tr. at 54; *see also United States v. Carson*, 455 F.3d 336, 370, 372 U.S. App. D.C. 251 (D.C. Cir. 2006).[23]

It also was well within reason for the jury to find that Demetrius Green's murder was a consequence of a territorial drug dispute associated with the charged conspiracy. Green was selling marijuana for James Penn, who controlled a stretch of houses at the top of a hill on

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[23] There is no claim that the jury lacked unanimity as to the ground for conviction. *See United States v. North*, 910 F.2d 843, 876, 285 U.S. App. D.C. 343 (D.C. Cir. 1990).

Forrester Street Southwest, less than a quarter mile from the Southeast border. Handy, accompanied by another man identified in the superseding indictment as Taron Oliver, was also selling marijuana down the hill nearer to the Southeast quadrant of Washington, D.C., not too far from Green. Penn understood Handy and Oliver to be associated with Erskine Hartwell, *see* Sept. 24, 2002 PM Trial Tr. at 19, all of whom were members of Moore and Gray's drug operation in Northeast, *see* July 9, 2002 PM Trial Tr. at 82; Aug. 26, 2002 PM Trial Tr. at 113-16. Because Handy was, in Penn's words, "stepping on [Green's] toes" by taking sales away, Penn walked down the hill to "holler at [Handy]" to "slow down" and not make so many sales. Sept. 24, 2002 PM Trial Tr. at 23, 25-26. Following the verbal warning, which was essentially ignored, Penn retreated up the hill to get his guns. Penn testified that he took action because Handy "didn't have no business right there" and that Handy's selling marijuana on that section of Forrester Street was considered to be "some sort of violation." *Id.* at 26. By the time he retrieved his guns, Penn testified, "somebody had ran in and said they had shot [Green]." *Id.* at 28. Oscar Veal testified that Handy later claimed credit for murdering Green. *See* Aug. 27, 2002 PM Trial Tr. at 18. Eliminating rival competitors furthered the charged conspiracy by strengthening its presence in the D.C. drug trade. *See United States v. Walker*, 142 F.3d 103, 114 (2d Cir. 1998).

## B.

More colorable is Handy's contention that the government failed to fulfill its obligations under *Brady*, 373

U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, by not disclosing exculpatory and impeachment evidence from Cheryl Pinkard, an eyewitness to Richard Simmons's murder. The government's key evidence against Handy was an eyewitness account of the murder by the victim's mother, Margarita Simmons. Ms. Simmons testified at trial that just prior to the murder she was standing by Richard as he used a street pay phone. She watched as Handy ran down H Street, Northeast, from the 12th Street side, drew a gun, and fired at Richard. Ms. Simmons grabbed Richard briefly before he ran away from Handy toward the corner of 11th Street and H Street. Richard collapsed at that intersection and Handy, standing over him, shot Richard several times. *See* Aug. 19, 2002 AM Trial Tr. at 9-14. Handy contends that an FBI 302 interview report[24] and the grand jury testimony of Pinkard, Richard's girlfriend, were exculpatory and subject to disclosure under *Brady* because they could have been used to impeach Ms. Simmons's testimony. *See Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). In Handy's view, the report and grand jury testimony show that Pinkard did not see Ms. Simmons standing with Richard at the pay phone and therefore Ms. Simmons was not an eyewitness to the murder. The government responds that there was nothing exculpatory about the report or Pinkard's grand jury testimony, and because they were not "material" disclosure was not required under *Brady*.

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[24] FBI 302 reports "are the formal typewritten interview reports prepared from the rough [interview] notes and recorded on Form FD-302." *United States v. Harrison*, 524 F.2d 421, 424 n.2, 173 U.S. App. D.C. 260 (D.C. Cir. 1975).

Under *Brady*, the government has a constitutional obligation to disclose "evidence favorable to an accused that is material to guilt or to punishment." *Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769, 1772, 173 L. Ed. 2d 701 (2009); *see also Oruche*, 484 F.3d at 596. To show a *Brady* violation, the defendant must establish that the evidence or information is favorable to him, either because it is exculpatory or impeaching; that the evidence was suppressed by the government, either willfully or inadvertently; and that he was prejudiced by the nondisclosure. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *see also United States v. Bailey*, 622 F.3d 1, 8, 393 U.S. App. D.C. 131 (D.C. Cir. 2010). Prejudice exists when the undisclosed evidence or information is "material," meaning "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *see also United States v. Pettiford*, 627 F.3d 1223, 1227, 393 U.S. App. D.C. 283 (D.C. Cir. 2010). The district court's findings of fact, including determinations of credibility at trial and in post-trial proceedings, are reviewed for abuse of discretion, "[b]ut once the existence and content of undisclosed evidence has been established, the assessment of the materiality of evidence under *Brady* is a question of law," which this court reviews *de novo*. *Oruche*, 484 F.3d at 595.

In making an initial determination about whether evidence or information is "material" and therefore subject to disclosure under *Brady*, *see United States v. Williams-Davis*, 90 F.3d 490, 514, 319 U.S. App. D.C. 267

(D.C. Cir. 1996), the prosecutor is afforded "a degree of discretion" bound by "a corresponding burden" (inasmuch as the prosecution "alone can know what is undisclosed") of "gaug[ing] the likely net effect of all such evidence and mak[ing] disclosure when the point of 'reasonable probability' is reached," *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The Supreme Court has instructed that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *see Kyles*, 514 U.S. at 439. This is particularly true where the defendant brings the existence of what he believes to be exculpatory or impeaching evidence or information to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Here, a prudent prosecutor would have disclosed at least Pinkard's grand jury testimony. Handy filed multiple requests for discovery, each of which sought *Brady* material related to the Simmons murder. Although Pinkard was not mentioned by name, Handy specifically sought, "[i]n reference to the Richard Simmons homicide, . . . any and all documents." Def. Timothy Handy's First Mot. to Compel Disc. app. 2, at 5 (Sept. 13, 2001). In subsequent correspondence with the government, Handy asked for "all documents pertaining to statements of non-testifying witnesses" and "*Brady* evidence and information regarding the murder of Mr. Richard Simmons," including "information that may impeach the witnesses against Mr. Handy." *Id.* app. 3, at 3. Although the Supreme Court has rejected the notion that *Brady* created a right of open file discovery for criminal defendants, *see Kyles*, 514 U.S. at 437; *Ritchie*, 480 U.S. at 59, given Handy's repeated requests and the centrality of eyewitness testimony to the government's case against him concerning the Simmons murder, *cf. Kyles*, 514 U.S. at 441-44, the prosecutor should have recognized that Pinkard's eyewitness account raised at the least a "doubtful question[]" favoring disclosure under *Brady*, *see Agurs*, 427 U.S. at 108.

The government's suggestion on appeal that Handy's *Brady* claim is foreclosed by his knowledge at the time of trial is not well taken. It noted that Handy knew Pinkard had witnessed the shooting and cross-examined Ms. Simmons without Pinkard's grand jury testimony. Although "the right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the . . . information chooses not to present such information to the jury," *United States v. Iverson*, 648 F.2d 737, 739, 208 U.S. App. D.C. 364 (D.C. Cir. 1981), the specificity and scope of the defendant's knowledge is the key consideration. In *United States v. Smith*, 77 F.3d 511, 515-16, 316 U.S. App. D.C. 199 (D.C. Cir. 1996), the court held that although aspects of a witness's plea agreement were known to the defendant, the prosecutor's nondisclosure of other elements of the plea agreement unknown to the defendant violated *Brady* because the information was material to the defendant's ability to impeach the witness. A review of the trial transcript excerpts provided by the parties indicates that Handy knew only that Pinkard was at the murder scene and had accompanied Ms. Simmons to the hospital after the shooting; his cross-examination of Ms. Simmons was limited to whether she spoke to Pinkard at the hospital, Aug. 19, 2002 AM Trial Tr. at 60-61, and when she first saw Pinkard at the scene, Aug. 19, 2002 PM Trial Tr. at 20-21. Absent the government's disclosure of Pinkard's grand jury testimony, Handy lacked a reason to delve further into Ms. Simmons's and Pinkard's allegedly different accounts of the murder. Under *Brady* it was incumbent upon the prosecutor to disclose Pinkard's grand jury testimony to Handy for his use at trial. *See Giglio*, 405 U.S. at 154; *Bagley*, 473 U.S. at 678; *United States v. Celis*, 608 F.3d 818, 835, 391 U.S. App. D.C. 112 (D.C. Cir. 2010).

Nonetheless, Handy fails to show that the violation of his due process right to disclosure under *Brady* was "material." *See Strickler*, 527 U.S. at 281-82; *Bagley*, 473 U.S. at 682. Handy places significant weight on Pinkard's testimony of December 11, 2003, during the subsequent trial of other co-conspirators. *See* Dec. 11, 2003 PM Group 2A Trial Tr. at 28-30, 50-51, 82-83, 86, 92, 95-98. In his view, her testimony that Ms. Simmons was *not* standing by Richard's side when he was talking on the pay phone before being shot is "illustrative" of the fact that Pinkard witnessed the murder but Ms. Simmons did not. This proves, Handy maintains, that the government knew Pinkard was a witness capable of impeaching Ms. Simmons's credibility as an eyewitness to Richard's murder, and thus her pretrial statements to law enforcement and grand jury testimony should have been disclosed. But Handy overstates the force of any likely impeachment.

First, Pinkard's subsequent trial testimony is not as impeaching as Handy suggests. She acknowledged up to a minute gap between observing Richard walk out to the pay phone and looking up to see him run down the street. *See id.* at 95. Ms. Simmons might easily have appeared at Richard's side during this time.

Second, before the grand jury Pinkard recounted that, prior to the murder, she was talking to her father on a pay phone across the street from Richard's sports store. *See* Oct. 27, 2000 Grand Jury Tr. at 23-24. She observed Richard exit the store to use the pay phone and signaled that they were running late by tapping her wrist. She then testified that "less than five minutes" later she "heard something go boom" and looked up to see Richard running down the street. *See id.* at 24. She then crossed the street to where Richard had collapsed, noting that Ms. Simmons "was, like, already right there. I don't know where she had come from." *Id.* at 26. Absent from the grand jury transcript is any assertion by Pinkard that Ms. Simmons was not standing next to Richard when he was shot while standing at the pay phone. To the contrary, the following exchange occurred:

> Q: And do you remember [Ms. Simmons] being outside at the time [of the shooting]?
>
> A: I think she was, but I'm not sure . . . . I think she was, because I think — I'm not sure, but I think when [Richard] came out to use the phone, he had locked the door. But I'm not sure. I don't know where she popped up from.

*Id.* at 41. Thus, Pinkard's subsequent trial testimony is inconsistent with, rather than illustrative of, her grand jury testimony on the key point. In another respect, her grand jury testimony shares the same flaw as her subsequent trial testimony. The five-minute gap between Pinkard observing Richard at the pay phone and hearing the first gunshot was a relatively lengthy period during which Ms. Simmons could have emerged from the store and joined Richard on the sidewalk without Pinkard's knowledge. Had the government disclosed the grand jury testimony to Handy prior to his trial, there is not a reasonable probability that this information could have been used to impeach Ms. Simmons's claim to be an eyewitness to Richard's murder such that it would have changed the outcome of the proceeding.

Third, even assuming a prudent prosecutor would have disclosed the FBI 302 interview report, it contains no representation one way or the other as to whether Ms. Simmons was present at the time of Richard's murder. The only reference to Ms. Simmons is this sentence: "PINKARD stated that she and [Richard] SIMMONS has just left their house and were en route to the movies when SIMMONS' mother paged him." *See* Def. Handy's Second Mot. for New Trial Exhibit 18, at 1 (Dec. 18, 2004). It is far from apparent how Handy could have used information from the FBI 302 interview report to impeach Ms. Simmons's credibility as an eyewitness and, as such, we are confident its use, even with disclosure of Pinkard's grand jury testimony, would not have changed the outcome of the proceedings.

## XXIV.

We reject all claims raised by appellants that we have not discussed individually. We have fully considered all such claims and find they do not warrant separate discussion or relief.

* * *

For the foregoing reasons, we affirm all of appellants' convictions except Count 32, which we vacate; Counts 4 and 5, which we remand to the district court for an evidentiary hearing and to address Smith's ineffective assistance of counsel claim; and Counts 126-138, which we remand to the district court for consideration in light of *Bullcoming v. New Mexico,* 131 S. Ct. 2705, 180 L. Ed. 2d 610 (U.S. 2011).

ROGERS, *Circuit Judge,* concurring in part in Part I of the per curiam opinion:

In *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court announced a three-part analysis to identify whether racial discrimination had motivated peremptory challenges in jury selection. First, the defendant must establish a *prima facie* case by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose," with respect to either a particular peremptory strike or a pattern of strikes. *Id.* at 93-94. Second, the prosecutor must "come forward with a neutral explanation for challenging [the] jurors," not based on racial or other impermissible classifications. *Id.* at 97. Third, the trial judge then "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98; *see also Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005); *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). This court has seldom addressed a *Batson* challenge, and on the rare occasion it has, our analysis of step three was limited.[1] A few observations beyond those stated by the court today are in order.

Justice Marshall, concurring in *Batson*, which he characterized as a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," had grave doubts that the goal of "end[ing] the racial discrimination that peremptories inject into the jury-selection process" could be accomplished without "eliminating peremptory challenges entirely." *Id.* at 102-03 (Marshall, J., concurring). His doubts, he explained, arose because defendants are only able to attack discriminatory use of peremptory challenges where the challenges are so flagrant as to establish a *prima facie* case, and because trial judges face the difficult burden of assessing a prosecutor's motives. *See id.* at 105-06. As to the latter, Justice Marshall asked, citing examples from the case law:

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[1] *See United States v. Watson*, 483 F.3d 828, 376 U.S. App. D.C. 22 (D.C. Cir. 2007); *United States v. Spriggs*, 102 F.3d 1245, 1254-55 (D.C. Cir. 1996); *United States v. White*, 899 F.2d 52 (Table), 1990 WL 42213 (D.C. Cir. 1990). By contrast, the *Batson* issue has been fulsomely explored on multiple occasions by the District of Columbia Court of Appeals where the United States Attorney is also responsible for prosecutions involving felonies and major misdemeanors under the D.C. Code. *See, e.g., Smith v. United States*, 966 A.2d 367, 369-88 (D.C. 2009).

> How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as [the] defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"?

*Id.* at 106 (internal citations omitted). Justice Marshall foresaw that "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Id.*

Justice Powell, writing for the Court, responded:

> While we respect the views expressed in Justice Marshall's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. . . . We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think

> that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

*Id.* at 99 n.22 (majority opinion).

The Supreme Court, therefore, expected that trial judges, in fulfilling their duty, would effectively ensure that the justice system did not facilitate the denial of equal protection by remaining vigilant and attentive to the risk that overzealous prosecutors may inject racial strategies into jury selection in the effort to obtain a conviction. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The Court expected the trial judge would undertake "'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

The Supreme Court has repeatedly emphasized the significance of the trial judge's role at step three. In *Johnson*, the Court explained:

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification

> becomes relevant — the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

545 U.S. at 171 (quoting *Purkett*, 514 U.S. at 768). Indeed, the defendant need not show that it is more likely than not that the peremptory challenges, if unexplained, were based on impermissible group bias, *id.* at 168, 173, and the case proceeds to step three even if the prosecution "produces only a frivolous or utterly nonsensical justification for its strike," *id.* at 171. As explained in *Snyder v. Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008):

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance.

*Id.* at 477 (alteration in original) (internal citations omitted). A reviewing court, in turn, "ordinarily should give [the trial judge's] findings" based on an evaluation of demeanor and credibility "great deference." *Batson*, 476 U.S. at 98 n.21.

"The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172. "The three-step process . . . simultaneously serves the public purposes *Batson* is designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Id.* at 172-73 (citation and internal quotation marks omitted). The rights *Batson* vindicates, however, are not confined to the rights possessed by the defendant on trial, but extend "to those citizens who desire to participate 'in the administration of the law, as jurors,'" *id.* at 172 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664 (1880)), as well as to "the overriding interest in eradicating discrimination from our civic institutions [that] suffers whenever an individual is excluded from making a significant contribution to governance on account of his race" or other suspect characteristic, *id.* The "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," for "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Powers v. Ohio*, 499 U.S. 400, 412, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Long before *Batson*, the Supreme Court had observed: "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940) (footnote omitted). The role of the trial judge, in either dispelling any notion that the proceedings have been affected by prejudice or repudiating such prejudice when it occurs, remains paramount, even today in the District of Columbia.[2] This important function of the trial judge is fully consistent with the motivations underlying *Batson*, 476 U.S. at 87, and not served by conclusory or dismissive rulings of the district court.

Since *Batson*, when the Supreme Court has encountered cases where the trial judge failed to fulfill his or her duty, it has not hesitated to examine the *voir dire* proceedings in painstaking detail, inasmuch as a single instance of racial discrimination in jury selection requires reversal of a conviction, *see id.* at 95-96. An example of such detailed review is *Snyder*, where the trial judge failed to make a finding on the record based on the evidence presented regarding the prosecutor's two explanations for striking an African American juror, and consequently the deference inherent in clear error review was replaced by what was tantamount to *de novo* review. *See* 552 U.S. at 479, 482.[3] This is reflected in the practice of circuit courts of appeals when reviewing contentions that would normally be subject to clear error review but for the fact that the district court made no findings of fact. *See, e.g., United States v. Microsoft Corp.*, 147 F.3d 935, 945 n.7, 331 U.S. App. D.C. 121 (D.C. Cir. 1998); *see also United States v. Smith*, 640 F.3d 580, 596 (4th Cir. 2011); *United States v. McMath*, 559 F.3d 657, 663 (7th Cir. 2009); *Dennis v. Mitchell*, 354 F.3d 511, 517 (6th Cir. 2003); *Armienti v. United States*, 234 F.3d 820, 822 (2d Cir. 2000); *United States v. Vega*, 221 F.3d 789, 795 (5th Cir. 2000). As to the first of two explanations proffered, the Supreme Court reasoned in *Snyder* that, in the absence of a specific finding, it could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.* As to the second proffered explanation, the Supreme Court concluded, quoting at length the transcription of the trial court proceedings, that the prosecutor's "explanation given for the strike . . . is by itself unconvincing," *id.* at 478, and that "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting [time] obligations that appear to have been at least as serious as [those of the struck black juror]," *id.* at 483; *cf. Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (on habeas petition). Additionally, when confronted on habeas review with a state prosecutorial policy to strike African American members of the venire that resulted in a pattern of such strikes in *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196, the Supreme Court held, upon a searching record review, that the trial judge's factual findings as to the nonpretextual nature of the state's race-neutral explanations were wrong by clear and convincing evidence, *id.* at 266. In a concurring opinion one Justice acknowledged Justice Marshall's concerns and the defects intrinsic to the *Batson* analysis, *see id.* at 266-67 (Breyer, J., concurring), and concluded that "a peremptory jury-selection system that permits or encourages the use of stereotypes work[s] at cross-purposes" with "the law's antidiscrimination command," *id.* at 271-72.

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[2] A five-part study of jury service in the District of Columbia by the National Center for State Courts identified that among the reasons the general public avoids jury service is perceived unfairness and biases in the justice system. *See* Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?*, 20 JUST. SYS. J. 203, 212 (1999). Various recommendations have been developed to address this perception, including the elimination or curtailment of peremptory strikes that in "the experience of most trial judges . . . at a minimum, give[] the appearance that prospective jurors are being peremptorily stricken on grounds of race, gender or both." Council for Court Excellence: District of Columbia Jury Project, Juries for Theyear 2000 And beyond: Proposals to Improve the Jury Systems in Washington, D.C. 26 (1998).

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[3] In adopting a clear error standard of review, the Supreme Court in *Snyder*, 552 U.S. at 477, cited the plurality opinion in *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), in which concern was expressed that a more searching review of findings made in a state trial court would be incompatible with concepts of federalism. *Id.* at 369. No federalism concern exists with respect this court's review of the district court's *Batson* ruling.

The Supreme Court's post-*Batson* precedent has forewarned lower courts that *Batson* objections are not to be lightly dismissed. A one-size-fits-all approach by the trial judge — summarily stating that the prosecutor's explanations are credible — risks reversal of a conviction on appeal. The Supreme Court has held that the prosecutor's response to an allegation of racially motivated peremptory strikes "must [be] a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). It would be remarkable, to say the least, to conclude that the trial judge's evaluation at step three of the *Batson* analysis need not also be clear and reasonably specific.

Even though "these determinations of credibility and demeanor lie peculiarly within a trial judge's province and . . . in the absence of exceptional circumstances, [the Supreme Court] would defer to [the trial court]," *Snyder*, 552 U.S. at 477 (second alteration in original) (internal citations and quotation marks omitted), no deference is due to the trial judge's *Batson* ruling based on the evidence before it unless it explains on the record why it credited the prosecutor's race-neutral explanation and rejected the defendant's arguments that an individual strike was racially motivated or that a series of strikes demonstrated a pattern of racially motivated strikes. *See id.* at 479; *cf. Miller-El v. Cockrell*, 537 U.S. at 341-43. After all, in *Batson*, and before and after, the Supreme Court emphasized that purposeful racial discrimination in jury selection, resulting in the denial of equal protection, "harms not only the accused whose life or liberty they are summoned to try," but "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," "undermin[ing] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Miller-El v. Dretke*, 545 U.S. at 237-38; *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L. Ed. 664 (1880). The Court's precedent contemplates no less than that trial judges will give full consideration to the evidence presented of racial bias, *see Snyder*, 552 U.S. at 478, by, for example, comparing the prosecutor's behavior in striking, not striking, and questioning like jurors of different races, looking for patterns or statistical disparities, and examining whether any policy or practice of the relevant prosecutor's office implicates *Batson* concerns, *see, e.g., Miller-El v. Cockrell*, 537 U.S. at 331-35.

Because the district court's findings in the instant case were conclusory, without sufficient explanation to permit meaningful appellate review, the usual deferential review falls away and the question is whether this court, upon review of the record, finds by a preponderance of the evidence that the defendant has established purposeful discrimination by the prosecutor. Although not characterized by the Supreme Court as *de novo* review, the analysis of the court today, sifting struck-juror by struck-juror through the transcription of the *Batson* proceedings, much as the Supreme Court did for a single struck juror in *Snyder*, reflects this reality. *See* Op. at 9-13. The Supreme Court contemplated, inasmuch as a single *Batson* violation requires reversal of a conviction, *see, e.g., Snyder*, 552 U.S. at 478, that the trial judge would provide a record that reveals on an objection-by-objection basis how, upon considering "all of the circumstances that bear upon the issue of racial animosity," *id.* (citing *Miller-El v. Dretke*, 545 U.S. at 239), the defense objections to the prosecutor's strike explanations were resolved. Otherwise, the Supreme Court's expectation of the constitutional protection institutionalized in *Batson*, as well as the expectations for the prosecutor and trial judge described in Justice Powell's response to Justice Marshall's concerns, will have proven illusory. This explains the painstaking review of the trial court record that the Supreme Court has undertaken, for example, in *Snyder*, 552 U.S. at 478-84, and *Miller-El v. Dretke*, 545 U.S. at 240-66, to underscore that the third step of *Batson* cannot become a matter of rote or one-size-fits-all analysis.

On the merits, appellants' *Batson* challenges do not entitle them to reversal of their convictions, even upon *de novo* review of the record.[4] A single example suffices. Defense counsel challenged the striking of "Juror 5773" on the ground that the prosecutor was applying a double standard in peremptorily striking "Juror 5773," an African American male, but not "Juror 6487," a Caucasian male. Both were opposed to the death penalty. The prosecutor in his *Batson* step two response stated that "Juror 5773" gave equivocal answers about the death penalty and his religious views thereon. Appellants maintain that the record showed that the main concern of "Juror 5773" was not religious but a concern of condemning the wrong man to death. During the *Batson* colloquy, defense counsel had argued that "Juror 5773" had "some pro-prosecution instincts regarding the death penalty, but [was] generally thoughtful," and disagreed that "Juror 5773" "would oppose the death penalty on religious grounds." Instead of dealing with this factual disagreement and making reasonably specific findings on the record to which this court, as appropriate, could defer, the district court ruled as to all defense challenges that it credited the prosecutor's explanation of non-racial reasons for all of the peremptory strikes of African American members of the venire.

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[4] Appellants do not pursue on appeal their *Batson* challenges based on gender. *See* Appellee's Br. at 28 n.21.

A review of the transcription of the *Batson* proceedings supports the plausibility of the prosecutor's race-neutral explanations for its peremptory challenge to "Juror 5773," even upon *de novo* review. The relevant answers provided by the two veniremen in their questionnaires reveals a salient difference. The Caucasian venireman followed his expression of opposition to the death penalty with the statement: "I would try to abide by the Court's instruction, not my personal belief." By contrast, the African American venireman indicated his concerns about the death penalty would cause him to have concerns about being fair, explaining he had "so many questions about the death penalty and [his] belief in it." Cognizant that the burden of persuasion to prove the existence of purposeful discrimination in peremptory strikes ultimately rests with the defendant, *Johnson*, 545 U.S. at 170-71, it is apparent that the prosecutor's proffered explanation that the difference in the veniremen's answers and not a difference in their race motivated their disparate treatment. For essentially the reasons stated by the court with respect to the remaining strikes, *see* Op. at 9-13, each likewise survives *de novo* review of the record.

In view of the equal protection concerns identified earlier, a final observation bears mentioning. As a matter of public record, the jury venire in the District of Columbia in 2011 is unlikely, as it was in 2002 when jury selection began in the instant case, to have a majority of African American venire members, no matter how many are peremptorily struck by the prosecutor. The U.S. Census of 2000 showed that African Americans were 60.0% of the District of Columbia's population, with Caucasians making up 30.8%; Hispanics or Latinos were 7.9%. The venire in the instant case was approximately three-quarters African American, and the twelve-member jury that was selected for trial was composed of nine African American jurors and three Caucasian jurors. The demographics have changed. The U.S. Census of 2010 showed that African Americans comprise 50.7% of the District of Columbia's population to Caucasian's 38.5%, with Hispanics or Latinos comprising 9.1%. Likely then,[5] in a trial of an African American defendant, a prosecutor will no longer be able to pose the rhetorical question in the government's brief, contrary to the purposes of *Batson* and its progeny: Why, as a matter of trial tactics, would the government discriminate in exercising peremptory challenges when the venire and the petit jury would be overwhelming African American? Appellee's Br. at 68; *see also* May 7, 2002 PM Trial Tr. at 25, 32. Courts in the District of Columbia likewise will likely be unable, as a factual matter, to base acceptance of a prosecutor's race-neutral explanations for strikes at *Batson's* third step in part on the generality, as in 2002, that a predominantly African American jury will nonetheless be seated. To the extent distrust of the justice system among minorities and women persists, based in part on fear that they will be discriminated against during jury service, *see supra* note 2, accepting the prosecution's approach, as reflected in the rhetorical question, suggests in view of the changing demographics in the District of Columbia at least two concerns: First, a growing risk that an overzealous prosecutor could be successful in turning a jury toward conviction based on racially motivated or otherwise discriminatory peremptory strikes. Second, such activity by prosecutors would result in greater mistrust of the justice system and reduced participation in jury service by the affected populations.

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[5] Individuals are called for jury service in the District of Columbia based on lists of registered voters, licensed drivers, and those having nondriver identification cards from the D.C. Department of Motor Vehicles. *See* Seltzer, *supra* note 2, at 204.

# APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 29, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3050

Consolidated with 05-3051, 05-3052, 05-3053,
05-3054, 05-3064

UNITED STATES OF AMERICA,

APPELLEE,

v.

RODNEY L. MOORE, ALSO KNOWN AS RASOO,

APPELLANT.

Appeals from the United States District Court
for the District of Columbia
(No. 1:00-cr-00157)

September Term, 2010
Filed on: July 29, 2011

Before: SENTELLE, *Chief Judge,* ROGERS and KAVANAUGH, *Circuit Judges*

*Appendix C*

## JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed in part, vacated in part, and the cases are remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

***Per Curiam***

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk

Date: July 29, 2011

Opinion *Per Curiam*
Opinion concurring in part in Part I filed by Circuit Judge Rogers.

# APPENDIX D — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED NOVEMBER 30, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3050

Consolidated with 05-3051, 05-3052, 05-3053, 05-3054, 05-3064

United States of America,

Appellee

v.

Rodney L. Moore, also known as Rasoo,

Appellant

September Term 2011

00cr00157-02

**Filed On:** November 30, 2011

**BEFORE:** Sentelle, Chief Judge, and Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

*Appendix D*

## ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

***Per Curiam***

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

## APPENDIX E — NOTE TO JURY IN RESPONSE TO JANUARY 3, 2003 JURY NOTE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED JANUARY 3, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil/Criminal No. 00-157

United States of America

vs.

Kevin Gray, et al.

### NOTE FROM JURY

1. With regard to Count One (Narcotics Conspiracy), does the statute of limitations apply to subparts (A) - (D) under "Controlled Substances," in addition to the Count as a whole?

2. With regard to Count Three (RICO), does the statute of limitations apply to Racketeering Act 1, in addition to the Count as a whole?

3. If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?

Date: 1–3–2003

#6
FOREPERSON

Time: 10:51

*Appendix E*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. Action No. 00-157 (RCL)

UNITED STATES OF AMERICA

v.

KEVIN L. GRAY, RODNEY L. MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, LIONEL NUNN,

Defendants.

## NOTE TO JURY IN RESPONSE TO JANUARY 3, 2003 JURY NOTE

Please look at my instructions as a whole in making your decision as to each of these matters. As to your specific questions today, here are my answers:

### *QUESTION ONE*

Jury question: "With regard to Count One (Narcotics Conspiracy), does the statute of limitations apply to subparts (A) - (D) under "controlled substances," in addition to the Count as a whole?"

Response: No. The statute of limitations described in my instructions at pages 50 and 51 applies to each defendant's alleged participation in the conspiracy charged in Count One as a whole. It does not apply to any particular type or quantity of controlled substance which the government has alleged was involved in the conspiracy. I instructed you as to how to determine each defendant's responsibility for the controlled substances alleged in the indictment elsewhere in my instructions - at pages 55 through 58.

### *QUESTION TWO*

Jury Question: "With regard to Count Three (RICO), does the statute of limitations apply to Racketeering Act 1, in addition to the Count as a whole?"

Response: No. The statute of limitations described in my instructions at pages 67 and 68 applies to the existence of the alleged conspiracy and to each defendant's alleged participation in the racketeering conspiracy charged in Count Three as a whole. It does not apply to any alleged racketeering acts of the conspiracy.

### *QUESTION THREE*

Jury Question: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?"

Response: You have asked a question regarding a defendant who leaves a charged conspiracy before the relevant date included in my instructions to you on the statute of limitations. The relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes, or a date on which that defendant withdrew from that conspiracy. I will now give you further instruction on the issue of what conduct constitutes withdrawal from a conspiracy. Once the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them. If the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy, and that those acts were communicated to the defendant's co-conspirators in a manner reasonably calculated to reach those co-conspirators. Withdrawal must be unequivocal.

/s/
Royce C. Lamberth
United States District Judge

Date: 1-3-03

# APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED FEBRUARY 7, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 00-157 (RCL)

UNITED STATES OF AMERICA,

v.

KEVIN GRAY
RODNEY L. MOORE
JOHN RAYNOR
BRYAN BOSTICK
DERRICK MOORE
ROY JOHNSON
KENNETH SIMMONS
CALVIN SMITH
LARRY WILKERSON
TIMOTHY HANDY
LIONEL NUNN
RONALD ALFRED
JAMES ALFRED
FRANKLIN SEEGERS
and
DEON OLIVER

Defendants.

## MEMORANDUM OPINION AND ORDER

* * *

### C Defendant Gray's Motion to Dismiss Based on Time Limitations; Defendant Smith's Motion to Dismiss Counts and Overt Acts Because the Statute of Limitations Has Expired

Defendants Gray and Smith have filed motions arguing that the statute of limitations compels the dismissal of certain charges. Both defendants claim that there is a five year statute of limitations applicable to all federal crimes, *see* 18 U.S.C. § 3282. On that basis, defendant Gray argues that counts one, two, three, five, seven, eight, nine, eleven, twelve, fourteen, seventeen, nineteen, twenty, twenty-one, twenty-two, twenty-four, twenty-eight, thirty, thirty-three, and thirty-five should be dismissed. In the alternative, defendant Gray argues that any overt acts which fall outside the five-year statute of limitations should be stricken from the indictment. The Government opposes defendant's motion, but does concede that counts eight, nine, twelve, twenty, twenty-one, and twenty-two should be dismissed against defendant Gray. In addition, the Government concedes that counts eighty-five through one-hundred should be dismissed against defendants Gray, Moore, Wilkerson, and Raynor. Defendant Smith argues that counts one, three, and ninety-six should be dismissed. The Government opposes defendant Smith's motion as to counts one and three but concedes that count ninety-six is beyond the statute of limitations and should therefore be dismissed. The Court will GRANT in part defendant Gray's motion to dismiss as to counts eight, nine, twelve, twenty, twenty-one, and twenty-two but DENY defendant's motion as to all other counts. In addition, the Court will, with the consent of the Government, dismiss Count 96 as to defendant Smith, and counts 85 through 100 as to defendants Gray, Moore, Wilkerson, and Raynor.

> Section 3282 of Title 18 of the United States Code reads:
>
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282. Defendants interpret this statute to forbid any prosecution where any part of the indictment falls outside the five-year period. The Court will analyze the application of this statute to the charged conspiracies and substantive offenses to determine whether defendants merit relief.

1. Conspiracies

To determine whether the conspiracy charges are barred by the statute of limitations, the Court must first determine whether the conspiracies charged in counts one and three require the Government to allege and prove an overt act. For conspiracies which do not require an overt act, the indictment satisfies the statute of limitations if the conspiracy is alleged to have continued into the limitations period. *See United States v. Coia*, 719 F.2d 1120, 1124 (11th

Cir. 1983); *see also United States v. Salerno*, 868 F.2d 524, 534 (2d Cir. 1989) (holding that a RICO conspiracy is complete only when the purposes of the conspiracy have been either accomplished or abandoned). A conspiracy requiring an overt act is deemed complete–and the statute of limitations begins to run–at the time the last overt act is completed. *United States v. Fiswick*, 329 U.S. 211, 216 (1946).

The conspiracy charged against both defendants in count one, conspiracy to violate 18 U.S.C. § 846, does *not* require the Government to allege or prove an overt act. *See United States v. Pumphrey*, 831 F.2d 307, 309 (D.C. Cir. 1987). "An indictment under 21 U.S.C. § 846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege any specific act in furtherance of the conspiracy." *United States v. Ramirez*, 54 F. Supp. 2d 25 (D.D.C. 1999) (citations omitted). Similarly, count three, conspiracy to violate 18 U.S.C. § 1962(d), does not require an overt act. *See Salinas v. United States*, 522 U.S. 52 (1997); *United States v. Philip Morris, Inc.*, 130 F. Supp. 2d 96, 98-99 (D.D.C. 2001). The government must only allege that a defendant agreed to commit two or more racketeering acts, or agreed that another member or members of the conspiracy would commit two or more racketeering acts. For both count one (conspiracy to violate 21 U.S.C. § 846) and count three (conspiracy to violate 18 U.S.C. § 1962) the Government has alleged–and the Grand Jury found probable cause to believe–that the conspiracy continued into the five-year period covered by the statute of limitations, and that defendants' membership in the conspiracy continued into the five-year period covered by the statute of limitations. Therefore, defendants' motions to dismiss counts one and three are DENIED.

# APPENDIX G — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED MAY 16, 2002

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN
RAYNOR, CALVIN SMITH, TIMOTHY HANDY
and LIONEL NUNN,

Defendants.

Washington, D.C.
Thursday, May 16, 2002
9:42 a.m.

DAY 41 - AM SESSION

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

[Witness: Agent Daniel Sparks]

* * *

[75] **Q. All right. You mentioned in your testimony just now Calvin Smith. I want to turn to him for a moment.**

**On cross-examination, you were asked about when he became a target of this investigation.**

A. Yes.

**Q. All right. And was he one of the initial targets of the investigation?**

A. Yes.

**Q. And then you were asked about whether or not he was ever on the wiretap or any of the other types of evidence that you got in the late '90s, '97, '98, '99. Do you remember that?**

A. Yes, I remember that.

MR. CARNEY: Objection, Your Honor.

THE COURT: Overruled.

MR. CARNEY: May I approach?

THE COURT: Yes.

(Whereupon, a discussion was held at the bench on the record.)

MR. CARNEY: Your Honor, where he's headed is to ask why he didn't do a wiretap between '95 and 2000. The answer is going to be because he was incarcerated, and I have a continuing objection to that because, one, he could [76] have done and they did tape relatives of Mr. Smith and they could have taped him on the phone with Kevin Gray. So it's going to be a misleading answer and it's highly prejudicial.

MR. OLSEN: I am going to elicit that, Your Honor, that he was actually incarcerated during that time period. I mean, it does meet the question of whether or not -- why he didn't have -- why the agents didn't obtain evidence about him during that time frame, which was a primary point of Mr. Carney's cross-examination.

But in addition, Your Honor, it's not prejudicial because Calvin Smith was locked up on a Racketeering Act, a charged Racketeering Act in this case. It is going to be part of our proof that he shot Maurice Willis and pled guilty to that and has been incarcerated since that time. That shooting, that Maurice Willis shooing, is part of the indictment, it's a charged Racketeering Act.

THE COURT: The objection is overruled.

(End of discussion at the bench.)

BY MR. OLSEN:

**Q. During that time frame, Agent Sparks, that we were just talking about, '95 to the present, where was Calvin Smith?**

A. He was locked up.

**Q. And was he incarcerated for a particular shooting?**

A. Yes.

[77] **Q. And that shooting, is that one of the charges that's in this case?**

A. Yes.

**Q. Where did that shooting occur?**

A. It occurred in the Stanton Dwellings public housing complex, I believe on either Robinson Street or 15th Place.

**Q. And those are -- are those areas that you've talked about as being one of the neighborhoods that this operation -- that this organization operated in?**

A. Yes.

**Q. Now, you were also asked about Calvin Smith himself not being on the wiretap. Is that true, he's not on the wiretap?**

A. That's true.

**Q. All right. Is there any discussion of Calvin Smith on the wiretap?**

A. Yes.

**Q. Who is that between?**

A. Between his wife, Nicole Smith, and Kevin Gray.

MR. CARNEY: Objection, Your Honor. Hearsay.

THE COURT: Overruled.

BY MR. OLSEN:

**Q. What's the substance of that conversation?**

A. She is relaying to Kevin Gray that she wants to get some marijuana so she can take it into Calvin Smith down at [78] the Lorton Reformatory.

* * * *

# APPENDIX H — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED MAY 21, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Tuesday, May 21, 2002
9:47 a.m.

DAY 44 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[102] [Witness: Raymond Sanders]

(Whereupon, a discussion was held at the bench on the record.)

THE COURT: What's your expectation of what he is going to say?

MR. HEAPHY: He's going to say for his own protection. But I am going to go to a specific conversation similar to the one he recounted with Bostick between Mr. Sanders and Calvin Smith at Lorton about the intention of Mr. Moore and Mr. Gray to kill him, their solicitation of Mr. Smith to kill Sanders, which I think is vitally relevant, Your Honor. It demonstrates relationships in the conspiracy. It's all charged -- we've charged a conspiracy to kill him.

MR. COBURN: With respect to that latter proffer, part of the proffer that Mr. Heaphy just provided, I don't think I can formulate an objection to that; however, I do think the portions of the plea agreement that provide for protection are -- at least I don't see what relevance they have.

I mean, I understand the government has a right to go into the 5K requirements and so on because they rightfully expect that that's going to be the subject of cross, but I at least have no intention of crossing him with respect to his enrollment in the Witness Security Program and that sort of thing. It seems to me it's just innuendo [103] essentially that is tarnishing Mr. Moore and Mr. Gray.

THE COURT: Okay. That's overruled.

MS. HOLT: My only objection was to the form of the question. He asked why did the government. I think he has to ask him what is his understanding or something along that line. I would --

MR. HEAPHY: That's fine, Your Honor.

(End of discussion at the bench.)

BY MR. HEAPHY:

Q. Mr. Sanders, what is your understanding as to why the government moved you out of Lorton down to Orange County?

A. For my protection, my safety.

Q. Was there anything in particular that happened at Lorton which led to you being moved to Orange County?

A. Yes.

Q. What exactly?

A. The incident with Bryan Bostick.

Q. All right. Did you have conversations with anyone else?

A. Yes.

Q. Who?

A. Assay.

Q. Who is Assay?

A. Calvin Smith.

Q. Again, do you see him in the courtroom today?

[104] A. Yes.

Q. Is he the man here that you identified yesterday?

A. Yes.

Q. Tell us about your conversation with Calvin Smith when you were housed at Lorton.

A. He said that Rodney came down to see him and said that Kevin wanted him to do something to me.

Q. Wanted him to do what to you?

A. Wanted him to kill me.

Q. Did he say whether or not he intended to follow through?

A. No.

Q. Did he say that he did not intend to follow through?

A. He said he wasn't.

Q. Why exactly?

A. He said I was his man.

Q. He said who was his man?

A. I was his man.

Q. How do you feel about that, Mr. Sanders?

MR. COBURN: Objection. Irrelevant.

THE COURT: Overruled.

BY MR. HEAPHY:

Q. How do you feel about the fact that Mr. Smith refused to take your life?

A. How I feel about it?

[105] Q. Yes.

A. I was, you know. I felt good about it.

Q. How does that affect your willingness to testify about Mr. Smith in these criminal activities?

A. It's hard for me to do.

* * * *

# APPENDIX I — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED MAY 21, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, LIONEL NUNN,

Defendants.

Washington, D.C.
Thursday, May 21, 2002
2:20 p.m.

DAY 44 - PM SESSION

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

[Witness: Raymond Sanders]

* * *

[36] Q. Did you later have a conversation with Mr. Smith about why he pleaded guilty in this case?

MR. CARNEY: Objection, Your Honor.

THE COURT: Overruled.

BY MR. HEAPHY:

Q What did he say?

A. He say he took the plea for Kevin can get the misdemeanors.

Q. Explain that. What did Mr. Smith say about why his plea lead to Kevin getting a misdemeanor?

A The only way that they can get the plea is both of them plea. And by him -- he got the felony and Kevin got the misdemeanors.

* * * *

# APPENDIX J — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED JUNE 26, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Wednesday, June 26, 2002
9:50 a.m.

DAY 63 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[42] **[Witness: Dennis Robinson]**

Q. Did Mr. Smith ever tell you anything about it?

A. Not that I can remember.

Q. Did you know about anything that happened as a result of the conflict?

A. I know Kevin and Asay went around Robinson Street and supposed to have shot, you know, supposed to have shot somebody.

Q. Is that about all that you know about it?

A. Yes.

Q. Now, did you know whether Mr. Smith was charged with that?

A. Yes.

Q. What happened when he was charged with that?

A. He took a -- he took a plea bargain. I can't remember exactly how much time; maybe four to -- four years to twelve years or six years to 18 years, something like that.

Q. So he got some sentence for that?

A. Yes.

Q. Did you ever go visit him when he was in jail?

A. Yes.

Q. Tell us about those visits. First of all, where did you visit him?

A. I only visit him two times since, you know, since he been locked up.

[43] Q. And --

A. The first --

Q. Okay. The first time?

A. The first time was over D.C. Jail and the second time, when he was -- when he was down Lorton, down Central.

Q. Did he tell you anything about Mr. Gray when you visited him those times?

MR. CARNEY: Objection, Your Honor.

THE COURT: Overruled.

BY MS. JEFFRESS:

Q. Did he tell you anything about Mr. Gray when you visited him then?

A. I mean, he basically was like, you know, I better, you know, watch what I'm getting myself into as far as, you know, hanging around Mr. Gray being as though, you know, he knew what Mr. Gray -- you know, the type of activities he was involved in.

Q. And he was saying that to you?

A. Yes.

Q. That you ought to watch out?

A. Yes.

Q. Did he say -- did he tell you about anything he wanted from Mr. Gray while he was incarcerated?

A. He just said, you know, he wanted -- he wanted Kevin to send him some money. That's basically it.

[44] Q. Did he ask you to do anything in connection with that?

A. He told me, you know, if I see Kevin, tell Kevin, you know, send him some money.

* * * *

# APPENDIX K — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED JULY 9, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE,
JOHN RAYNOR, CALVIN SMITH,
TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Tuesday, July 9, 2002
9:35 a.m.

DAY 69 - AM SESSION
TRANSCRIPT OF JURY TRIAL .
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

[Witness: Maurice Andrews]

* * *

[58] **Q. How do you know Calvin Smith?**

A. I knew Calvin Smith for a while. Met him through a guy that I used to deal with.

**Q. Okay. Who was that that you used to deal with that you met Calvin Smith through?**

A. Wayne Edelin.

**Q. Wayne Edelin?**

A. Yes.

**Q. And where was Calvin Smith from? Was he from 15th Place?**

[59] A. No. he wasn't.

**Q. Do you know what part of town he's from?**

A. He's from the other side of Southeast over 15th Street by D.C. Jail.

**Q. And during what time period -- was he ever, Mr. Andrews, as far as you know, was he ever a member of this organization?**

A. Yes, he was.

**Q. During what time period?**

A. Ever since I been in it.

**Q. All right. And did there come a time when Mr. Andrews was -- I'm sorry -- Mr. Smith was incarcerated?**

A. Yes, it was.

**Q. Do you remember about when that was?**

A. Before -- I'd say '94.

**Q. Was Mr. Smith particularly close to anyone else that you've mentioned this morning?**

A. Yes, he was.

**Q. Who is that?**

A. Kevin Gray.

**Q. And how do you know that?**

A. They been very tight since juveniles.

**Q. Do you know where they met?**

A. Down Oak Hill.

**Q. How do you know that?**

[60] A. Because they was locked up together, and Kevin told me.

**Q. After Mr. Smith was incarcerated in 1994, did you continue to have contact with him?**

A. Did I continue to have contact with Mr. Asay?

**Q. Well, let me ask you that question: Did Calvin Smith have a nickname?**

A. Yes, he did.

**Q. What is his nickname?**

A. Asay.

**Q. All right. And after 1994, did Kevin Gray and you have contact with Calvin Smith when he was locked up?**

A. Yes, we did.

**Q. Where?**

A. Over the phone.

**Q. All right. And what kind of things did you talk to him about over the phone after 1994?**

A. Just basically sending him money for canteen and taking care of, you know, his baby mother and stuff like that.

* * * *

# APPENDIX L — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED JULY 9, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, LIONEL NUNN,

Defendants.

Washington, D.C.
July 9, 2002
2:12 p.m.

DAY 69 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[46] **[Witness: Maurice Andrews]**

Q Then more recently, Mr. Andrews; were you locked up with Calvin Smith?

A Yes, I was.

[47] Q Where was that?

A Over D.C. Jail.

Q And did Calvin Smith tell you anything about his feelings about what happened that day?

A Yeah. He was still mad because he got more time out the whole deal.

Q Did he say anything else -- well, who was he mad at?

A He was more mad at Kevin.

Q Why?

A Because Kevin --

Q Did he say why he was mad at Kevin?

A Just basically Kevin because wasn't doing what he was supposed to do for him as far as sending him money like he really wanted it.

Q At the time that you had that conversation with Mr. Smith, did Kevin Gray have any kind of car on the street?

A Yes, he did.

Q What kind of car was he driving?

A He had a Mercedes.

Q And did Calvin Smith make any mention of that?

A Yes, he did.

Q What did he say?

MR. CARNEY: Leading.

THE WITNESS: He was saying that Kevin out there [48] doing and he wasn't doing for him. So he was mad.

BY MR. OLSEN:

Q Was there any mention of the actual car? When you say Kevin was out there doing it, what does that mean?

A That means Kevin was getting a lot of money. He had found out Kevin had a Mercedes, and he was just saying why Kevin wasn't sending him money like he was supposed to.

* * * *

# APPENDIX M — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED JULY 23, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, LIONEL NUNN,

Defendants.

Washington, D.C.
July 23, 2002
2:05 p.m.

DAY 77 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[63] **[Witness: Dennis Dante Robinson]**

THE COURT: Next witness.

You can resume the stand. I remind you you're [64] still under oath. Counsel, you can have him identify himself.

DIRECT EXAMINATION

BY MS. JEFFRESS:

Q Good afternoon, Mr. Robinson.

A Good afternoon.

Q Could you introduce yourself to the jury again by stating your full name.

A Dennis Dante Robinson.

Q And, Mr. Robinson, you testified a few weeks ago in this trial?

A Yes.

Q And when you testified before, was it your understanding that you would be recalled again to testify about events that took place later than the previous events you testified about?

A Yes.

Q Now, let me just ask you a couple of questions relating back to your testimony then.

As you explained earlier, you are the cousin of a defendant, Calvin Smith, in this case; is that right?

A Yes.

Q Now at some point Mr. Smith was arrested; is that right?

A Yes.

Q And then he was no longer a part of the group that you [65] used to spend time with on Robinson Place after that?

A No.

* * * *

# APPENDIX N — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED AUGUST 5, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, AND LIONEL NUNN,

Defendants.

Washington, D.C.
Monday, August 5, 2002
2:08 p.m.

DAY 84 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE, and a jury

* * *

[121] [Witness: Derron Smith]

Q. All right. Now, Mr. Smith, I want to ask you about something that happened last week. Were you brought into this building to testify in this case last week?

[122] A. Yes.

Q. Do you remember when you were first brought here from CTF to testify?

A. Yes.

Q. What day was that?

A. Last Thursday.

Q. All right. Where were you first placed in this building when you were brought here from CTF?

A. Down in the bullpen.

Q. Is there a cellblock in this building downstairs?

A. Yes.

Q. Describe it for us. How is it laid out?

A. They got cells on this side, cells on this side.

Q. What's between those two cells? Is there like a hallway or a walkway?

A. A walkway.

Q. From the cells on one side of the walkway, can you see people on the other side?

A. Yes.

Q. Do you know what time of day you got here on Thursday?

A. Around about 7:00.

Q. 7:00 in the morning?

A. Yes.

Q. All right. At some point, did you see any of the men in this case?

[123] A. Yes.

Q. Who did you see?

A. Seen a young man over there, Asay. Young man, John-John Raynor and a young man, Dog.

Q. You obviously knew John Raynor before?

A. Yes.

Q. Did you know Dog before?

A. Yes.

Q. Had you ever seen him before in northeast?

A. Yes.

Q. How about this man over here you identified as Asay?

A. Never seen him before until that day.

Q. Where were they placed in relationship to you, Mr. Smith, in the cellblock downstairs?

A. Dog and John was placed on across from me. Dog was placed next to them.

Q. You indicated Dog was in two places?

A. I mean Asay and John-John was placed in the same cell. Dog was placed in the cell beside from them.

Q. From where you were in your cell, could you see John and Asay?

A. Yes.

Q. Give us a sense of your perspective of them. Were they right in front of you?

A. Like a cell down from me. The cell that was in front of [124] me was empty. Another cell, the other side here, that's where they was at. Then from their cell was Dog.

Q. Could you see John?

A. Yes.

Q. Could you see this man Asay?

A. Yes.

Q. Could you see Dog?

A. I could see Dog holding his hands out the bars, like this (indicating).

Q. But you couldn't see his face?

A. No.

Q. Okay. Now, at that time, Mr. Smith, had anybody from the government ever told you to ask any questions inside the jail?

A. No.

Q. Had you ever been encouraged to ask questions and get information from people with whom you were incarcerated?

A. No.

Q. Did anybody ever tell you that you were going to be placed across from any of the men against whom you were testifying?

A. No.

Q. Had you been told anything different from that?

A. No really.

Q. Did you sign an agreement, Mr. Smith, in which we promised to keep you separate from people against whom you were testifying?

[125] A. Yes.

Q. Were you surprised when you saw those men across from you?

A. Not really.

Q. Did you ask them any questions?

A. No.

Q. Did you at any time ever ask them any questions during the conversation?

A. No.

Q. Did they make statements to you?

A. Yes.

Q. During the statements that they made to you, did you react at all, did you say anything?

A. Stayed silent.

Q. Did you ever say anything?

A. Yes.

Q. When you responded, were you answering questions or were you asking questions?

A. I was answering questions.

Q. Questions that they posed to you?

A. Yes.

Q. Did all three of those men speak to you?

A. Yes.

Q. John, Asay, and Dog?

A. Yes.

Q. How do you know Dog spoke to you if you couldn't see his [126] face?

A. 'Cause I know his voice.

Q. Had you had contact with him on the street?

A. Yes.

Q. Did they address each other? Did they speak to each other?

A. Yes.

Q. Could you hear what they were saying to each other?

A. Yes.

Q. Did any of them call Dog by his name or nickname?

A. Yes.

Q. Which of them called him by his nickname?

A. Asay.

Q. Did you try, Mr. Smith, to get information from them during this conversation?

A. No.

Q. At any time did you try to get them to say anything to you that you could then use against them?

A. No.

MS. HOLT: May we approach?

THE COURT: Yes.

(Bench conference on the record.)

THE COURT: Do you need anything else for your foundation?

MR. HEAPHY: I don't, Your Honor. I have a few more [127] questions and then I'll be done.

MS. HOLT: The reason I came up with respect to foundation, I don't know if this was a hearing out of the presence of the jury to determine whether or not these events occurred and how they occurred, my client might testify. He would not waive his Fifth Amendment privilege to testify but my client was --

THE COURT: I denied the right to a Massiah hearing.

MS. HOLT: My client was in the cell with Mr. Lasley's client and would make different representations if there was a right to a hearing.

THE COURT: Right.

MS. HOLT: I just wanted to make that clear for the record.

Mr. LASLEY: Your Honor --

THE COURT: We can clarify this for the record after he goes. We're not going to get into the substance of the testimony.

(End of bench conference.)

BY MR. HEAPHY:

Q. Mr. Smith, just a couple more questions.

Before this happened, had you ever discussed with law enforcement whether or not you should engage other prisoners in any sort of conversation?

A. Can you rephrase that in a different way so I can [128] understand?

Q. Had anybody ever told you if you are ever placed across from anybody you try to know you should ask them questions and find out what's going on with them?

A. No.

Q. Had anybody encouraged to you say anything to anybody inside the jail?

A. No.

Q. Or inside the cellblock?

A. No.

Q. After this happened, Mr. Smith, did you report it to anybody?

A. Yes.

Q Who, exactly?

A. I pointed it to the homicide detective.

Q. Were you interviewed about it sometime after?

A. Yes.

Q. Okay. How long would you say, Mr. Smith, that this was the period of time in which you were in the cell directly across from or angled from Mr. Raynor and Mr. Smith? How long did it last?

A. About five minutes.

Q. And how did it end? How did the confrontation eventually stop?

A. It ended with the marshal pulling me out of the cell and [129] taking me where I supposed to have been at.

Q. How do you know it was where you were supposed to have been at in the first place?

A. The marshal said it.

Q. The marshal told you you were there by mistake?

A. Yes.

Q. Where did the marshal take you when they pulled you out of this first cell?

A. To the back.

Q. In that other cell, were you separate from the view of the men you just discussed?

A. Yes.

Q. Has that, Mr. Smith, been where you have been on Friday and today?

A. Yes.

* * * *

# APPENDIX O — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED AUGUST 6, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY AND LIONEL NUNN,

Defendants.

Washington, D.C.
Tuesday, August 6, 2002
9:39 a.m.

DAY 85 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[13] [Witness: Derron Smith]

**Q. Mr. Smith, good morning.**

A. Good morning.

**Q. Can you please state again your name for us.**

A. Derron Smith.

**Q. All right. Mr. Smith, when we left off yesterday, I was asking you about an encounter that you had last week down in the cellblock with three of the men who are here in this case. Do you recall that, those questions that I asked you yesterday?**

A. Yes.

**Q. Let's talk now specifically about what these men said to you.**

**Who was the first of the three to speak to you?**

A. The first man was that young man to my right, Asay.

**Q. Now, did you know Asay on the street?**

A. No.

**Q. Had you ever seen him before, to your knowledge, Mr. Smith, when you were at liberty, when you were out on the street?**

A. No.

**Q. What did Mr. Smith say to you at first when you first [14] saw him last Thursday down in the cellblock?**

A. He came in and he was going inside his cell and him and Dog was talking, and he turned around, he said, "Dog, be quiet, be quiet. You got that hot-ass nigga down here today. Be quiet."

**Q. Had you ever heard the term "hot-ass nigga" before?**

A. Yes.

**Q. What does that mean?**

A. It mean a person that's testifying, he hot.

**Q. All right. Now, again, had you ever seen this man, Asay, before?**

A. No.

**Q. He was speaking to whom when he said this?**

A. The young man right there in front of me, Dog.

**Q. The man you are now pointing to, --**

A. Yes.

**Q. --Dog. Had you ever seen him before?**

A. Yes.

**Q. Where exactly?**

A. On the streets.

**Q. Where exactly on the streets?**

A. Seventh and H, Northeast.

**Q. During what period of time, Mr. Smith, had you seen him out there?**

A. Ninety-eight.

[15] **Q.Before your arrest in '99?**

A. Yes.

**Q. After you came out of jail in '98?**

A. Yes.

**Q. Okay. Did you have a relationship with him, a friendship with him when you were on the street?**

MR. LASLEY: Objection. This is --

THE WITNESS: No.

THE COURT: Overruled.

BY MR.HEAPHY:

**Q. No. Who did you see him with, this man Dog, when you saw him in Northeast back in '98?**

MR. LASLEY: Objection.

THE COURT: Overruled.

THE WITNESS: John-John, Rodney Moore.

BY MR. HEAPHY:

**Q. Had you seen those three men together in Northeast before?**

A. Yes.

**Q. All right.**

**What else did this man, Asay, say once he said, "Look out, here comes someone hot"?**

A. After he told them -- after he told Dog that, then he turned and turned to me and towards the rest of the guys that was in the cell, and he was like, "You rat-ass niggas. [16] Y'all think y'all going to live and get away with it. Y'all niggas short."

Q. Short?

A. Yeah.

**Q. What does "short" mean, Mr. Smith, in your experience?**

A. Short to me mean -- street term is like, you know, you going to die.

**Q. Your time is short.**

A. Yes.

**Q. Mr. Smith told you that you were short?**

A. Yes.

**Q. Did he make reference at any time, Mr. Smith, to other people who were hot or cooperating with the government?**

A. He seen a rack of CTF guys over there from them wearing the blues that I got on today, and so he was addressing it to all of us that was over there, because people from the jails and federal penitentiaries, they label everybody that's over at the CTF hot because they know they got a hot block over there, so they label everybody hot because they don't know really who is who, so they just say all you hot dudes.

**Q. Were you in a block, Mr. Smith, or in a cell with other people who had come from CTF?**

[17] A. Yes.

**Q. Were all of you in that block wearing the same colored jumpsuit?**

A. Yes.

**Q. What color is that?**

A. Blue.

**Q. Have you always worn the blue jumpsuit when you've come to court from CTF?**

A. Most of the times.

**Q. Are there other colors that people at CTF wear?**

A. Yes.

**Q. What?**

A. They got red jumpsuit.

**Q. Is that different, Mr. Smith, than the color that people wear when they come from the D.C. Jail or other facilities?**

A. Yes.

**Q. What color do people from the D.C. Jail wear?**

A. They wear orange.

**Q. And so if you, in your experience while you've been incarcerated, see somebody that you don't know, can you sometimes tell where they are housed based on the color of their jumpsuit?**

A. Yes.

**Q. How many of you were there wearing the blue last [18] Thursday when Mr. Smith was addressing the hot people, about?**

A. It was about ten of us, but you can -- you can see for yourself that the CTF was over here and that the jail was over here because they had us all separated. The jail was over here with their orange jumpsuits on and we was over here with our blue on.

**Q. When you say here and there, are you talking about different areas of the cellblock?**

A. Different cells.

**Q. Okay.**

**Did Mr. Smith, throughout the time that you were directly there across from him, say anything about any other individual who is over at CTF?**

A. No.

**Q. Did he ever mention any other witness who is testifying in this case to you?**

A. Oh, yes. Yes.

**Q. Who did he mention specifically?**

A. He mentioned Pappy.

**Q. All right. Do you know Pappy?**

A. From being in the block with me, yes.

**Q. All right. Is he on your block now?**

A. Yes.

**Q. Do you know his real name?**

[19] A. Jermaine Vick.

**Q. Did you ever know Mr. Vick from the street?**

A. No.

**Q. What did Mr. Smith say to you about Pappy?**

A. I had a Kufi on.

**Q. What's a Kufi?**

A. Something that the Muslim brothers wear.

**Q. Is it a headgear of some kind?**

A. Yes.

**Q. All right.**

A. And he addressed it to me, thinking that I was a Muslim from me having my facial hair and the cap on, and at that time, he yelled out, he said, "That nigga Pappy got them niggas over there wearing them -- being Muslims and stuff, hot dudes and stuff," and said, "Man, I know you going from off the Koran, reading them Sura 6, Sura 4, 179 or something like that and thinking that it's cool to be telling or something."

**Q. Were you familiar with any of those references to passages in the Koran?**

A. No.

**Q. Are you a Muslim, Mr. Smith?**

A. No, I'm not.

**Q. You ever been to a Muslim service?**

A. No.

[20] **Q. Have you spoken to Mr. Vick at all about any of the Muslim teachings over at CTF?**

A. No.

**Q. Have you talked to Mr. Vick at all about what you're doing in this case?**

A. No.

**Q. Have you ever communicated with him about what you saw and what you experienced when you were out on the street?**

A. No.

**Q. Do you even have any kind of friendship or relationship with Mr. Vick?**

A. No.

**Q. Do you get along with him at all?**

A. No.

**Q. Why not?**

A. Because he a -- for one, he be praying a lot, and so he stays with his Muslim brothers and they stay together as a unity, and most of the time they praying or either they studying their Koran; and me, I just be in my cell or either playing basketball or working out. So no, I don't communicate with him like that.

**Q. All right. Mr. Smith, now during these five minutes or so that you were in this cell across from Asay, did he say anything else that you remember?**

[21] A. Yes.

**Q. What else did he say?**

A. From there, he said that Damien Champion, the man that I supposed to have murdered, he told me that, "I bet Damien rolling over in his grave right now and he know that a hot-ass nigga killed him, that a coward killed him. I bet he rolling over in his grave right now."

MARSHAL BRADSHAW: May I have a moment? (Whereupon, a discussion was held at the bench off the record.)

THE COURT: May I see counsel at the bench?

(Whereupon, a discussion was held at the bench on the record.)

THE COURT: I'm going to issue a temporary stay of Mr. Carney's order pending the general counsel and others at the Marshal Service appearing before me to argue for reconsideration.

MR. HEAPHY: Your Honor, I would actually, on that issue, like to just notify our Civil Division. They often get involved representing the marshals on these matters. Mr. Carney just gave us this motion this morning and I would like to at least notify them to see if they would like to appear --

THE COURT: That's fine.

MR. HEAPHY: -- and weigh in on the motion.

[22] THE COURT: Mr. Olsen can take care of that.

MR. HEAPHY: Okay. Thank you, Your Honor.

MR. CARNEY: Your Honor, well, I would ask, then, that I be put at the end of the cross-examination.

THE COURT: Well, let's see where we are.

(End of discussion at the bench.)

THE COURT: Go ahead. Mr. Heaphy.

MR. HEAPHY: Thank you, Your Honor. I actually want to make sure Mr. Carney can hear this.

(Brief pause in proceedings.)

BY MR. HEAPHY:

**Q. All right. Mr. Smith, there were a couple of things in there that you just said.**

**First of all, the man that you pled guilty to murdering, what was his name?**

A. Damien Champion.

**Q. The same man from whom you testified previously you used to receive drugs?**

A. Yes.

**Q. Okay. Damien Champion was involved in drugs; is that right?**

A. Yes.

**Q. When Mr. Smith said he's rolling over in his grave, what did you take that to mean?**

A. Exactly what he said.

[23] **Q.That Damien would be disappointed somehow about what his killer is doing?**

A. Yes.

**Q. All right. Anything else at all that Mr. Smith said at any time during those five minutes that you recall?**

A. He said more, but it stopped, and then it switched to Dog.

**Q. Let's talk about Dog. What did Dog say to you at first?**

A. When Asay was saying that -- told him to be quiet and stuff like that and addressed to me that I'm hot and all this, Dog then said that, "They must going to move him to Wyoming somewhere because that nigga think he going to get away with this and live. He got the game fucked up."

**Q. Meant to say who was going to have to move to Wyoming?**

A. He said that the government must going to have to -- must going to move me to Wyoming somewhere if I think I'm a get away with cooperating because I got the game fucked up if I think that.

**Q. When you say "got the game fucked up," what does that mean? What did you take that to mean?**

A. He threatened my life.

**Q. Could you see this man Dog's face when he said this?**

A. I can see his hands out the bars.

[24] **Q.Describe that to us. What exactly could you see?**

A. See him leaning out the bars like this.

**Q. Which way was he facing when his hands were leaning out?**

A. Facing the way that you facing me now.

**Q. And who was in the cell into which his hands were coming through?**

A. He was.

**Q. Dog was?**

A. Yes.

**Q. Who was on the other side of the bars where his hands were?**

A. Huh?

**Q. Who was on the other side of the bars where his hands were facing?**

A. He was on this side with his hands out the bars, and then John-John Raynor and Asay was beside him.

**Q. Was between the two of them, the cell in which Dog was held and the cell in which –**

A. Yes.

**Q. -- Asay and John were held? Was there a wall between them or bars?**

A. A wall.

**Q. So they couldn't see each other.**

A. Uh-uh.

[25] **Q. You could only see Dog's hands?**

A. Uh-huh.

**Q. How do you know it was him speaking, then, if you didn't see his face?**

A. Because I know Dog from on the streets, from me being around him, and I know him from inside the jail and I know his voice.

**Q. All right. So had you spoken to him when you were on the street?**

A. Yes.

**Q. Had you spoken to him when the two of you were held together at the D.C. Jail?**

A. Yes.

**Q. Did any of the other men, either Asay or John, speak to Dog during this whole five-minute period?**

A. Yes.

**Q. Did they ever address him by his nickname?**

A. Asay addressed him by Dog.

**Q. Right at the beginning.**

A. Yes.

**Q. Okay.**

**What else did Dog say besides they're going to have to move you to Wyoming at all during the five minutes?**

A. From there, he was like that I ain't got nothing but eight to 25 years, and Asay said, "How long he been in?", [26] and he said, "He been in for four years now," and then Asay went back and said, "Damn, you can't do four years, Shorty?" He was like, "Man, death before dishonor." That's what Asay said right there. And then it switched back to Dog, and Dog was like, "He trying to get home to that -- to that broad."

**Q. Now, you're describing a conversation between Dog and Asay?**

A. Yes.

**Q. Where Asay was -- or -- Asay was asking how much time you had left on your sentence?**

A. Yes.

**Q. And did Dog have some information about that?**

A. Yes.

**Q. Was he correct about the amount of time that you have served and the amount of time you have left, approximately?**

A. Somewhere.

**Q. Okay.**

**"You can't do eight to 24. Again, what did you take that to mean?" Is that a long or a short sentence, in your view relatively?**

A. That's a long sentence.

**Q. Okay.**

A. Twenty-four is the number, basically. You know, the eight is mandatory, you know, you can't see the Parole Board or nothing like that, and most of the time, the Parole Board [27] will give you a hit, two- to four-year hit, but you -- as me being incarcerated, I take the 24.

**Q. You could be incarcerated for as long as 24 years.**

A. Yes.

**Q. But you may get out as soon as eight?**

A. Yes.

**Q. Is that essentially what eight to 24 means?**

A. Yes.

**Q. Okay.**

**What else did Dog say at any time --**

MR. LASLEY: Objection.

THE COURT: Overruled.

BY MR. HEAPHY:

**Q. What else did Dog say at any time during those five minutes when you were involved in this conversation?**

A. He said other things, but then it switched to -- it switched to John-John Raynor, then after that --

**Q. All right. Let's talk about that. John-John Raynor, again, is that the man that you've talked about yesterday?**

A. Yes.

**Q. What's the first thing that be said to you?**

A. After Dog had told -- had said about the time to Asay, John came in and was trying to talk to me, and was like, "What's up, Shorty?" And I was like, "What's up?" And then he said, "Man, that's fucked up, what you doing. [28] You know, this ain't even you, to be testifying like this, you know what I'm saying You wasn't even raised like that, your family ain't raise you like that, I ain't raise you like that, and I know your mother and your brothers and then, cousins and them, don't even know about what you doing." And at that time, I had indicated to him, I said, "Yeah, you right," you know. He said, "Yeah, I know. You doing it undercover." And then Dog came back in and this --

**Q. Stop right there for a minute. Did Mr. Raynor address you in a different tone or a different manner than Asay and Dog had addressed you?**

A. Yes, he did.

**Q. Did he take a lighter tone or a softer tone?**

A. Yes.

**Q. Okay. Is that consistent, Mr. Smith, with the relationship that you had with John?**

A. Yes.

**Q. Did that tone change over time as he continued to talk to you?**

A. No.

**Q. He always addressed you politely.**

A. Yes.

**Q. All right. What else did he say then when you indicated that you were doing this undercover or hadn't told people about your cooperation arrangement?**

[29] A. What else did which one say -- Dog or John?

**Q. John.**

A. When he said that, I had told him that he right, that, you know, my family don't agree with it and I didn't tell them, and then be said, "Yeah, I know." And he was like, "I got your paperwork, though, and I sent it out to the feds and over to the jail and stuff, and I also sent your mother one, too."

**Q. Who said that?**

A. John-John Raynor.

**Q. Said that he sent your paperwork over to the jail?**

A. Uh-huh.

**Q. Out to the feds?**

A. Uh-huh.

**Q. What does that mean the feds?**

A. Sent it to people that was in the feds.

**Q. Is that where you're going, Mr. Smith, at some point to serve the remainder of your sentence?**

A. Yes.

**Q. And he said he sent something to your mother?**

A. Yes.

**Q. Did John Raynor know your mother?**

A. Yes.

**Q. From their time together on the street.**

A. Yes.

[30] **Q.Okay. You mentioned that at some point, Dog jumped in or got involved in this part of the conversation. What did he say?**

A. He said, "John, stop talking to that hot-ass nigga. Fuck that nigga. Stop talking to him."

**Q. All right. Did John indicate that he had told anyone else about the fact that you were going to testify in this case?**

A. Him and Asay yes.

**Q. What -- who specifically did they say that they had notified about your testimony?**

A. Ken-Ken.

**Q. Who is Ken-Ken?**

A. Ken-Ken is a guy from around Northeast that grew up with John-John.

**Q. Do you know if Ken-Ken's ever shot anybody before?**

A. Yes.

**Q. Do you have personal knowledge of that?**

A. Yes.

**Q. What did you take it to mean when John and Asay told you that they told Ken-Ken about the fact that you were testifying?**

A. I took it as they put a threat on my life also, because they said that he was going to be inside the courtroom Thursday when I had came up, that he was going to [31] be inside there to verify me testifying, and they --

**Q. I'm sorry. Verify you testifying?**

A. Verify me testifying.

**Q. Okay. Did you ever see Ken-Ken in the courtroom?**

A. I never came up Thursday.

**Q. Okay. What else did they say about Ken-Ken?**

A. That was all.

**Q. And again, who talked about him? Was it Asay or John?**

A. It was -- John had talked about him and Asay was co-signing everything he was saying.

**Q. Did they say anything, Mr. Smith, about whether or not you would get out or what would happen when you got out?**

A. Oh, yes.

**Q. What did they -- first of all, who said this?**

A. John.

**Q. What did John say about that?**

A. He said I can't go back around Northeast.

**Q. Did he say why?**

A. Because I was cooperating.

**Q. Did John say anything more about how you were raised or about any sort of code?**

A. Yes.

**Q. What did he say about that?**

A. He just kept on trying to address that I'm wrong for [32] what I'm doing and that I shouldn't be cooperating and stuff, that I wasn't raised like that, and that he know that my family and them don't even know and they don't

-- because they don't agree with what I'm doing, and I replied to him, "Yeah, you right."

**Q. So was he right when he said your family didn't know that you were doing this?**

A. Yes, he was right.

**Q. Why doesn't your family know, Mr. Smith?**

A. Because I know my family going honor the code. What I'm doing, you know, they --

**Q. What is the code that you're talking about?**

A. They honor that no cooperation with the government at all. You know, my family is the type of people that live the same lifestyle that I live and these young men today live, and, you know, my family did time and stuff and they was in the positions where they was facing murder cases and stuff and they don't even -- they don't agree with what I'm doing, so that's why I ain't tell them.

**Q. Who in your family specifically has been in that position?**

A. My mother did five years.

**Q. Did your mother ever cooperate or talk to the government about what happened in her case?**

A. No.

[33] **Q. Who else in your family has been in that predicament?**

A. My cousins and my brothers.

**Q. Any of them ever cooperated with law enforcement that you know of?**

A. No.

**Q. Any of them very say to you whether or not you should or should not cooperate if you ever get locked up?**

A. Yes.

**Q. What did they say to you?**

A. They told me cooperation not allowed, you know, and I made a disgrace to my family.

**Q. All right.**

**Did Mr. Raynor say anything about the code that he was living by or what he was going to do?**

A. Yes.

**Q. What did he say about that?**

A. I told him he need to use his head, and he told me, he said if he go down, he going to go down as a man, as long as he ain't going down as no rat.

**Q. All right. At any time, Mr. Smith, did anybody Indicate what they had in store for you or ready for you on cross-examination?**

A. Yes.

**Q. Who said that?**

A. John-John and Asay.

[34] **Q.What did they say about that?**

A. They said that they -- "Don't worry, we loaded for you today, we loaded. Yeah, we got five bodies we going -- we going -- unsolved bodies up Trinidad we going to put on you, yeah. What about that -- I bet you ain't tell them about that dude Twin you killed."

**Q. Did you ever hear anything about any guy named Twin in Trinidad?**

A. No.

**Q. Did you ever -- has anybody ever said to you that you were a suspect or had done anything to anybody named Twin?**

A. No.

**Q. Do you even know what they were talking about?**

A. No.

**Q. Did they mention anything else specifically in terms of these five unsolved bodies?**

A. They just said five bodies that's up Trinidad that's unsolved that they going to load me up with.

**Q. When you say "load me up with," what does that mean?**

A. That they lawyers -- when they lawyers cross-examine me, they lawyers going to hit me with them "Did I tell y'all this, did I tell y'all that," or "You did this" or "You -- you know, like that.

**Q. Bodies. When you say five bodies, what do you mean by bodies?**

[35] A. Somebody, some human being has been killed and that's considered as a body.

**Q. Okay. Anything else that John said to you during these five minutes at all?**

A. That was it.

**Q. All right. Can you remember anything else, Mr. Smith, that any of these three men said to you during this five-minute encounter? Anything else specifically that we haven't talked about?**

A. That was it.

**Q. How did it make you feel?**

A. It made me feel -- you know, for one, I'm already scared for my life, and second, it makes me scared more.

**Q. How did it end? Tell me how this conversation finally stopped.**

A. It stopped by a marshal coming to get me out of the cell.

**Q. Did the marshal then pull you to some other area of the cellblock?**

A. Yes.

* * * *

# APPENDIX P — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED AUGUST 22, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, and LIONEL NUNN,

Defendants.

Washington, D.C.
Thursday, August 22, 2002
9:37 a.m.

DAY 91 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[6] [Witness: David Lee Arnold]

**Q. Now, prior to this time when Mr. Gray and Mr. Andrews talked to you about their thinking that you were cooperating with the police, had anyone else ever been suspicious of you cooperating with the police before then?**

A. Yes, ma'am.

**Q. When was that?**

A. This was in '97.

**Q. And what happened in 1997?**

A. Mr. Gray came to me and told me that Rodney Moore paid an investigator a thousand dollars to check my files to see if I was cooperating with the police.

**Q. Mr. Gray told you this?**

A. Yes, ma'am.

**Q. And what did Mr. Gray tell you?**

A. He said that Rodney Moore paid Mark Rochon's investigator a thousand dollars to pull my files up to see if I was cooperating with the police.

**Q. That was Mark Rochon's investigator?**

A. Yes, ma'am.

[7] **Q. Do you know the name of Mr. Rochon's investigator at that time?**

A. His name was Andy.

**Q. And who was it who paid the investigator a thousand dollars?**

A. Rodney Moore.

**Q. Do you know why or did Mr. Gray tell you why they thought that you might be cooperating with the police?**

A. There was some guys down Lorton that said that I had --

MR. COBURN: Objection.

THE COURT: What is the basis of that knowledge? Establish that first.

BY MS. JEFFRESS:

**Q. You just mentioned some guys down in Lorton. Do you know who the guys down in Lorton had spoken to?**

A. The guy named Asay.

**Q. Is that the Asay who you identified yesterday who is in the courtroom?**

A. Yes, ma'am.

**Q. And did Asay then tell Kevin Gray about this?**

A. Yes, ma'am.

**Q. What did Kevln Gray tell you that he had learned from Asay?**

A. That Asay had said that some guys said that I had [8] cooperated with the police on him.

**Q. And had you cooperated with the police?**

A. No, ma'am.

* * * *

# APPENDIX Q — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED AUGUST 22, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, and LIONEL NUNN,

Defendants.

Washington, D.C.
Thursday, August 22, 2002
2:10 p.m.

DAY 91 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE, and a jury

* * *

[104] **[Witness: Dennis Dante Robinson]**

Q. Let's go on to this conversation that you had in, you said it was '97; is that right?

**A. '97, when?**

Q. With -- you said you had a conversation with someone that told you that people in Lorton said that you were a snitch; you remember that?

**A. Yeah.**

Q. Okay. Who told you?

**A. Kevin Gray.**

Q. Kevin Gray told you that people were saying that you were snitching. This is 1997.

**A. Kevin Gray told me that somebody said I took the stand on somebody.**

Q. Okay. Today you said that Mr. Smith told Kevin Gray?

**A. He did. He told --**

Q. Is that correct?

**A. -- Kevin Gray and Kevin Gray told me.**

Q. Okay. So when you testified in the grand jury, you remember testifying in the grand jury, this was asked of you?

**A. Yeah.**

Q. You had indicated -- I'm going on memory but I'll try to find the sheet in a second -- you had indicated that you had [105] said some guys. There was more than one that were saying that you were snitching; do you remember that?

**A. Yeah.**

Q. Okay. But in the grand jury, you did not testify that it was Mr. Smith that told Kevin Gray; isn't that true?

**A. Yeah, that's true.**

Q. And today is the first time that you tell us that now it's Mr. Smith that told Kevin Gray that you were snitching?

**A. Some guys told Mr. Smith and Mr. Smith told Kevin Gray that I was snitching.**

Q. Okay. Well, let's go through this. You're out at Lorton. Okay. Let's go through Lorton now where these guys -- were these guys at a modular facility?

**A. I don't know what facility they was at.**

Q. Let's see if this jars your memory. Were they at minimum security?

A. **Wherever Mr. Smith was at, that's where they were at saying that.**

Q. You're Sure Mr. Smith was there?

You said Lorton people. Let's go through the facilities. Was he at youth center one? Was he at youth center two?

A. **That's what they told him at.**

Q. Was he at the maximum security, maximum behind the wall?

A. **I don't know where he was at.**

Q. But you heard this from Mr. Gray; is that right?

[106] **A. Yeah.**

Q. That some guys told Mr. Smith and then he in turn told him.

Now, how did this conversation between Mr. Smith and Mr. Gray occur?

A. **They found out that Mr. Gray was dealing with them. Mr. Gray was -- you know -- messing --**

Q. -- how did Mr. Smith have a conversation with Mr. Gray?

A. **He called down to the apartment.**

Q. He called down by telephone?

A. **Yeah.**

Q. Mr. Smith called him?

A. **He called down to our apartment. We had phones in the apartment. He called down there.**

Q. Okay. So Mr. Smith called your apartment, right?

A. **Yeah.**

Q. But your apartment had a cell phone, it didn't have a phone, correct?

A. **It had other phones at one time --**

Q. -- your apartment didn't have a phone, correct?

(Simultaneous conversation.)

A. **It had phones at one time. Mr. Gray took the phones out.**

Q. So you're saying now sometime there were phones in this apartment; is that right?

A. **Yes, there was phones in the apartment.**

[107] Q. Okay. What year?

A. **In '97.**

Q. What year did you go to Halley's place?

A. **What year did I go with?**

Q. Your apartment was Halley when you were living over there?

A. **Hadley.**

Q. Hadley? Didn't you move there in '98?

A. **I moved there in '97.**

Q. What month?

A. **It was in the fall of '97.**

Q. And this conversation took place in the fall of '97?

A. **Yeah.**

Q. Why would people think that you were snitching in the fall of '97?

A. **I don't have no idea.**

Q. No idea? That they just --

**A. -- they was mad because Mr. Gray was messing with me.**

Q. People were making up things about you because you were messing with somebody?

**A. If they say I took the stand on somebody, yeah, they had to be.**

Q. I see. And it's your testimony now that there was a phone call from Mr. Smith and -- did you take the phone message or talk to him?

**A. No, I did not.**

[108] Q. Okay. And were you present when this conversation took place?

**A. I was -- I was around. I was around when he was talking to him on the phone. When he called down there.**

Q. I see. So he was able to make a call and, as you know, phone calls from the prison are generally monitored, right?

**A. Yeah.**

Q. Okay. So he made this phone call, saying watch out for this guy; is that right?

**A. He said why you all fucking with that nigger, man, that nigger got on the stand on somebody. The word down here is he got on the stand on somebody.**

Q. Okay. Yet according to you, not until 1999 did Mr. Gray have anything to say about you not to deal with you, refused to deal with you, right?

**A. Mr. Gray, when Mr. Gray told me that, they said what I was doing, he said man, I don't even believe that because you be around me too much for me to believe that.**

* * * *

# APPENDIX R — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED OCTOBER 2, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN
RAYNOR, CALVIN SMITH, TIMOTHY HANDY
and LIONEL NUNN,

Defendants.

Washington, D.C.
Wed., October 2, 2002
9:46 a.m.

DAY 113 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[79] [Marvin Kevin Dixon]

Q. Did Kevin Gray on another -- I want to ask you about another person. Did Kevin Gray ever talk about a person nicknamed Asay?

MR. CARNEY: Objection, Your Honor. Hearsay, foundation, 801(d).

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. OLSEN:

Q. What did Mr. Gray tell you about the person Asay?

A. He said that was his main man.

Q. All right. And --

A. He said that he's vicious, and when he come home, it was going to be over for everybody out here.

Q. When he told you that, did you know where Asay was at the time?

A. In jail.

Q. How did you know that?

A. Because he said he was in.

Q. Mr. Gray told you that?

A. Yes.

Q. Did Mr. Gray ever take steps to give anything to Asay?

A. Maybe a female, he might have gave some marijuana to a female for him. Asay father would come around --

Q. Let me ask you about that first. Were you actually [80] with Kevin Gray when he gave marijuana to a woman for Asay?

A. Yes.

Q. All right. Did you actually go to meet somebody -- the woman somewhere?

Q. Kentucky Fried Chicken on South Capitol Street.

Q. How much?

A. A few bags.

Q. A small amount.

A. Yes.

Q. All right. And how do you know that that was for Asay?

A. Because he got it from Frank and he said, "This for Say, I need some weed for Say."

Q. Had you ever met Asay or Say?

A. No. I don't even know him.

* * * *

# APPENDIX S — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED OCTOBER 16, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, LIONEL NUNN,

Defendants.

Washington, D.C.
October 16, 2002
2:08 p.m.

DAY 118 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[37] [Witness: Maurice Willy Andrews]

Q Now, the last time you testified, Mr. Andrews, you identified in the courtroom Calvin Smith, nicknamed Asay?

A That's correct.

MR. CARNEY: Objection scope.

BY MR. OLSEN:

[38] Q In 1998, 1999, where was Asay at that time?

A He was incarcerated.

Q Did you ever have conversations with Kevin Gray about staying in touch with Calvin Smith during that time frame?

MR. CARNEY: Objection, Your Honor, scope.

THE COURT: Overruled.

THE WITNESS: Yes, he stayed in contact with him.

BY MR. OLSEN:

Q How?

A Through his family and his baby mothers.

Q What in particular did Kevin Gray do in terms of staying in touch with Calvin Smith during that time?

A Just basically his family would get in contact with Kevin, so Kevin could send him money and stuff, you know, take care of him in the canteen and stuff while he's locked up.

Q Did you have knowledge through Kevin Gray of Mr. Gray giving money to Calvin Smith while he was --

A Yeah, we went over there together and met his baby mother. We took her some money, and we took his father some money before.

Q How much money was it about?

A A couple hundred dollars, $200 here, $200 there.

Q What was the purpose of that?

A To send it to Asay.

[39] Q Did Mr. Gray ever talk about Calvin Smith coming home?

A Yes, he did. He always talked about Calvin Smith coming home.

Q What did he say about that?

MR. CARNEY: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: He just couldn't wait until Calvin come home. He couldn't wait until he come home. He love Asay.

* * * *

# APPENDIX T — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED OCTOBER 22, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, and LIONEL NUNN,

Defendants.

Washington, D.C.
Tuesday, October 22, 2002
2:01 p.m.

DAY 122 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE, and a jury

* * *

[51] **[Witness: Konstantinos Gianna Koulias]**

Q. Detective, I'm going to show you now these exhibits that are marked -- let's start with SW-MM-401. And if you can look at each of these, 401, 402, I'll put them in order as we go. 403, 404, 405, 406, 407, and 408.

[52] **A. Yes.**

Q. Do you recognize all these documents that I'm showing you?

**A. Yes, sir.**

Q. All right. What are they?

**A. They're the documents, or the letters, I recovered at the address 2921 Stillwoood Circle, apartment 404.**

MR. OLSEN: At this time I offer in evidence Government's Exhibits MM-401 through 408 inclusive.

MR. CARTER: No objection.

THE COURT: They're received.

(Government's Exhibit Nos. SW-MM-401 through 408 received into evidence.)

BY MR. OLSEN:

Q. What I'm going to do is show you these and at the same time display them to the jury and have you tell us what information -- what these are and why you seized those particular documents. All right?

**A. Yes, sir.**

Q. I'm going to begin with SW-401. Let me take it out of the plastic.

Do you recognize that?

**A. Yes, sir.**

Q. All right. What are we looking at on this piece of paper?

**A. Obviously the name Calvin Smith, the address, which is the [53] address here in D.C. of the Central Treatment Facility, and that's what CTF stands for, Central Treatment Facility. The unit number which is 3CA, 151. The top number is Mr. Calvin Smith's DCDC number. That's the Department of Corrections identification number.**

Q. All right. And if I just flip this over, does it appear to be some kind of a blank form from the Department of Corrections?

**A. Yes, it is, sir.**

Q. All right. Now, you said that you had -- you seized or recovered some correspondence, letters?

**A. Yes, sir.**

Q. Let me show you -- this one is marked SW -- I'll show -- 402. Do you see that?

**A. Yes, sir.**

Q. And on that particular envelope -- well, who is it addressed to?

**A. It's addressed to Kevin Gray, and on the side it says, interjail, meaning in the jail mail. If somebody is inside the jail, they can send letters back and forth to each other by putting it in intermail in the jail to it and what cellblock they're on at the time.**

Q. And in the return address portion of the envelope, what's written there?

**A. Big Dog.**

[54] Q. I want to show you the contents of the letter.

MR. CARNEY: May I object and approach?

THE COURT: Yes.

(Bench conference on the record.)

MR. CARNEY: Your Honor, there needs to be more foundation for that. First of all, it doesn't have the cell number. It has SE-2. There has to be a procedure for sending interjail mail.

I don't think the officer can testify he knows the procedures and how it is sent. The particular concerns to me is there's been no foundation that these letters were found inside these envelopes, that there's been no testimony on that.

And that the foundation that particularly concerns me is that there is such a procedure for inmates to write each other in the jail through jail inter -- intermailing. So my objection is foundation.

MR. OLSEN: My response -- these were recovered actually from Kevin Gray's residence.

THE COURT: Right.

MR. CARNEY: But it is hearsay as to the information that's on it to prove anything that's contained within it. So it is not only foundation, but there's hearsay elements to this, too.

THE COURT: Overruled.

(End of bench conference.)

[55] BY MR. OLSEN:

Q. Let me display this letter. It is actually -- it has two pieces of paper, but there's writing only on one page.

What I'll ask you to do, actually, Detective, is just read it aloud as we look at it here, if you could.

**A. Okay. "What's up Slim?" is the greeting. "I hope this letter reaches you in the best of health. As for me, I'm maintaining. Oh, yeah, you just got to be" -- excuse my language -- "fucked up with me, 'cause Pappy's cousin be on his own, Slim. He up there telling on" -- once again, excuse my language -- "nigger, and that's against my rules. I don't fuck with no hot niggers, so get back at me. Your main man."**

Q. As you see, there's no other writing on any other page of this letter?

**A. That's correct, sir.**

THE COURT: That letter was in the envelope he just showed you.

THE WITNESS: Yes, sir, it is.

BY MR. OLSEN:

Q. With respect to all the envelopes we're looking at today, Detective, were the letters actually inside the envelopes or were they separate when you recovered them?

A. **No. They were inside.**

Q. Now, I'm going to show you what's marked as SW-MM-403. And just taking a look at that envelope, who is it to and [56] who is it from?

A. **It is addressed to Mr. Gray, Kevin Gray, at the time being at Youth Center One in Lorton, Virginia. Once again, the corner of the letter identifies it was interjail mail, and on top, it's -- it says, Big Dog. It says, southwest 3, cell 26, and that's the DCDC number of Mr. Calvin Smith.**

Q. Now, the last envelope we looked at just had Big Dog up in the corner; is that right?

A. **Yes, sir.**

Q. It did not give a DCDC number or anything else indicating a cell or part of the jail or CTF that Mr. Smith was in at the time; is that right?

A. **No, sir.**

Q. Let me show you, just so it is clear, I'm displaying for the jury number 403, and then this envelope 402, and this is SW-MM-401.

Does SW-MM-401 have that DCDC number at the top?

A. **That's correct, it does.**

Q. Is that the same DCDC number that's indicated right here, pointing at SW-MM-403?

**A. Yes, sir, it is.**

Q. Do those two envelopes both have in the return address of the envelope the name, or nickname, Big Dog?

**A. Yes, they do.**

Q. All right. What I'd like to do, then, is take the [57] contents of this letter, actual writing on the letter, and display that for the jury.

This is a two-page letter, and I'm going to ask you again, Detective, to read it as I display it for the jury. Starting with this first page.

**A. "First of all, I must give all praises to Allah, the creator of all things. What's up, homes? All praises to Allah that my letter finds you in the best of health. As for me, I maintain holding my grounds as always or all way. Keep these chumps in front of me. I see you don't even keep in touch with me. What's up with that? You ain't even write and let me know you was gone. Don't tell me you forget about me too. You know, in the near future, I'm going to need your hands to reach out to everybody else."**

Q. There's nothing on the back. On the second page?

**A. "Playing 50, you and Rodney. The only two be my" -- be? – "corner. So get back at me and let me**

**know what's up. So until next time, stay strong and be careful. Watch them punks. I should be down there in a minute."**

Q. Just in terms of clarification, are you familiar with the term playing 50?

**A. Playing 50 means basically playing both sides of the fence.**

Q. That's followed up with the comment, statement, "you and Rodney the only two be in corner"?

[58] **A. Yes, sir.**

Q. Now, again, when was it that you actually recovered these letters?

**A. During the search warrant.**

Q. What date, though?

**A. That was September 11, 1998.**

Q. All right. From records, when was Calvin Smith at this location, southwest number 3?

**A. I believe Kevin Gray was in Youth Center in 1995, and I believe Mr. Calvin Smith was in CTF a portion of 1994, for about five to six months.**

Q. All right. So this letter would have been written approximately some three to four years prior to you recovering it at Maggie Mayo's address on Stillwoood Circle; is that fair to say?

**A. Yes, sir.**

* * * *

# APPENDIX U — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED NOVEMBER 4, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Monday, November 4, 2002
9:10 a.m.

DAY 129 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[145] [Witness: Stephen Graham]

A. Because I was -- I was down Central and even though I went to trial, it was rumored everywhere that I was cooperating with the government, that I was hot, and I was finding out from people that, you know, that Kevin was saying I was hot, Mr. Moore was saying I was warm. Even though I went to trial and lost, they still saying I was warm. And when I got down to Central, me and Mr. -- Calvin Smith, we had, you know, a minor discrepancy, you know, some words. We talked or whatever --

Q. You mentioned Calvin Smith. Where is he in the courtroom?

A. He's sitting over there, all the way over to the right, right here.

Q. What is his nickname?

A. Asay.

MR. HEAPHY: May the record reflect, Your Honor, the identification of Calvin Smith.

THE COURT: It will.

BY MR. HEAPHY:

[146] Q. Tell us about that discrepancy that you had with him down at Central.

A. To my understanding, you know, he -- he had heard that I was hot, you know what I'm saying, he heard that I was cooperating with the government, and I'm telling him like, "Man, I went to trial, you know what I'm saying?" I showed him my transcripts. Actually, I gave him a copy of the excerpts. And he was like, "Well, man, dam, you know what I'm saying, you know, why they going on you like that?"

So while I was down there, I had got a knife from two dudes. You know, I had two knives, and Mr. Smith came to me, told me to be careful who I'm around here asking for knives, and I told him, I was like, "Well, man, you know, you got 40, 50 guys running behind you and everybody keep coming to me talking about you beefing with me and I don't even know you." And I already knew what it was about, because it was rumored that I was, you know, that I was hot, and Kevin, you know -- and by Kevin being his man, you know, I take that saying, you know, he going to try something.

Q. How did you know that Mr. Smith was Kevin Gray's man?

A. Kevin talked about him and I done been in cars when Kevin talked to his wife or whatever.

Q. Tell me more about what Kevin Gray said about Calvin Smith when you all were on the street.

A. You know, that was his man, he got to meet his wife, [147] he got to, you know, go meet the guy, send him something.

MR. CARNEY: Objection, Your Honor. May we have a time frame?

THE COURT: Overruled. But you can establish when the conversations were.

BY MR. HEAPHY:

Q. Start over, Mr. Graham. Tell us specifically what Kevin Gray said about Calvin Smith when you all were on the street.

A. During the summer of '99, he just spoke in reference to having a friend that was locked up named Calvin Smith, named Asay that, you know, that had been locked up a while and, you know, he got to go meet his wife, his wife called him earlier that day, or so on and so forth.

Q. Did he say why he needed to meet Mr. Smith's wife?

A. To give her money. You know, Calvin was asking for money, so he would, you know, meet her and give her money for him.

Q. Did he say whether or not he, Mr. Gray, was in touch with Mr. Smith after Mr. Smith was incarcerated? Were they able to communicate?

A. Did Mr. Smith tell you that?

Q. Did either Mr. Gray or Mr. Smith tell you that they were able to speak after Mr. Smith was locked up?

A. I don't recall neither one of them speaking about [148] that. Asay's wife would call Kevin, you know, from time to time, I guess whenever Asay wanted her to call, told her to call and, you know, holler at him or whatever.

Q. How did this discrepancy, then, with Mr. Smith end when you all were together down at Central?

A. Well, a friend of ours, you know, I told him, you know -- he was like, you know, "Man, I'm a holler at him." I said, "Well, man, you know, go ahead and holler at him," I said, because, man, I ain't -- I ain't doing no going -- you know, a couple dudes, like, man, you know, you outnumbered or whatever. I was like, "I ain't doing no checking in man or whatever, I'm saying, because I ain't did shit." I said, "Whatever's going to happen is going to happen."

So we ended up staying out there, and then I used to go, you know, talk to him, you know, holler at him, you know, pray with him, and, you know, we was all right.

* * * *

# APPENDIX V — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED NOVEMBER 12, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Monday, November 12, 2002
9:10 a.m.

DAY 133 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[16] (Whereupon, Defendant Smith's Exhibit Number 77 was marked for identification.)

MR. CARNEY: Your Honor, the second joint stipulation is marked as Defense Exhibit Number 77, and the United States and its counsel, the United States Attorney for the District of Columbia, and Mr. Calvin Smith, through his counsel, Mr. John Carney, hereby agree and stipulate that court records and jail records reflect Mr. Calvin Smith was continuously incarcerated either at the District of Columbia Jail or Oak Hill Youth Center for the period from [17] December 3rd, 1990, through March 9th, 1993. In addition, those records reflect that Mr. Calvin Smith has been continuously incarcerated at various penal institutions for the period from June 1, '94 through the present.

* * * *

# APPENDIX W — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED DECEMBER 9, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Monday, December 9, 2002
9:14 a.m.

DAY 148 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[102] [Jury charge]

Section D of Count One of the indictment entitled "Overt Acts" describes various activities engaged in by alleged coconspirators to advance the purposes of the conspiracy. Proof of an overt act is not an element of the charge of a narcotics conspiracy. The government is not obliged to prove any particular one or more of the Overt Acts beyond a reasonable doubt, although it must prove beyond a reasonable doubt the existence of the conspiracy itself and a defendant's knowing and willful participation in it, as I will explain shortly.

At a later point in these instructions, I will be instructing you about predicate acts in relation to Count Two, which charges Kevin Gray and Rodney Moore with a continuing criminal enterprise, and racketeering acts in relation to Count Three, which charges each defendant with RICO conspiracy.

But returning to the subject of Count One, you must consider separately the issue of each defendants' participation. Specifically, for you to find a defendant [103] guilty of conspiracy, the government must prove each of the following elements beyond a reasonable doubt:

First, that beginning sometime in 1988 and continuing thereafter until and including November 2000, an agreement existed between at least two people to commit a federal crime, namely to knowingly and intentionally distribute or to possess with intent to distribute one or more of the controlled substances in the indictment:

cocaine, also referred to as cocaine powder; cocaine base, also known as crack; heroin and/or marijuana.

The agreement does not have to be in writing, or even to be an express or formal plan in which everyone who was involved sat down together and worked out all the details. The agreement may be very informal and existence of such an agreement may have to be inferred from the circumstances and conduct of the parties, because conspiracies ordinarily are characterized by secrecy. But the government must prove beyond a reasonable doubt that there was a common understanding among those who were involved to commit a crime. So the first thing that must be shown is the existence of an agreement.

It is not essential that the government prove that the conspiracy began or ended on the specific dates set forth in the indictment or that the conspiracy was in existence for any particular length of time. The government [104] is required to prove beyond a reasonable doubt, however, that the conspiracy charged existed in fact for some time within the period set forth in the indictment, sometime in 1988 until November 2000 and continuing within the period of the applicable statute of limitations, which I will discuss next.

If you find that the government has proven beyond a reasonable doubt that the narcotics conspiracy charged in Count One existed, you must also find that the narcotics conspiracy charged in Count One continued at a point in time within the statute of limitations.

I instruct you as a matter of law that the applicable statute of limitations is a five-year period. I instruct you as a matter of law -- I further instruct you as a matter of law that defendants Kevin L. Gray, Rodney L. Moore and John Raynor were charged people participating in this narcotics conspiracy on October 20th, 1999, defendant Calvin Smith was charged with participating in this narcotics conspiracy on May 5th, 2000; and defendants Timothy Handy and Lionel Nunn were charged with participating in this narcotics conspiracy on November 17th, 2000.

If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before [105] October 20th, 1999 for Kevin L. Gray, Rodney L. Moore and John Raynor, May 5th, 2000 for defendant Calvin Smith, and November 17th, 2000 for defendants Timothy Handy and Lionel Nunn, you must find the defendants not guilty of Count One.

If, however, you find with respect to any defendant that the government has proven beyond a reasonable doubt that there was a narcotics conspiracy, the defendant was a member of that narcotics conspiracy, and that the conspiracy continued in existence within five years before October 20th, 1999 for Kevin Gray, Rodney Moore and John Raynor, May 5th, 2000 for defendant Calvin Smith, and November 17th, 2000 for defendants Timothy Handy and Lionel Nunn, then it is your duty to find that defendant guilty of the narcotics conspiracy charged in Count One.

The second element of the offense which the government must prove beyond a reasonable doubt is that a particular defendant knowingly and willfully participated in the conspiracy and did so with the specific intent to distribute or to possess with the intent to distribute a mixture and substance containing a detectable amount of cocaine, also referred to as cocaine powder; cocaine base, also referred to as crack; marijuana or heroin.

The government must show the particular defendant's membership in the conspiracy. That defendant need not know the identities or the number of all the other [106] members of the conspiracy, nor all of the details of the conspiracy, nor the means by which its purposes were to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the government prove beyond a reasonable doubt that a particular defendant was aware of the common purpose, had knowledge that the conspiracy existed, and was a willing participant with the intent to advance the purposes of the conspiracy. An act is done willfully if it's done knowingly, intentionally, and deliberately.

In other words, before you may find that a defendant has become a member of a conspiracy, the evidence in the case must prove to you beyond a reasonable doubt that the defendant knowingly participated in the unlawful plan with the intent to advance or further some objective or purpose of the conspiracy. To participate knowingly means to do so voluntarily and intentionally, with the specific intent to do something that is against the law, and not because of mistake, inadvertence, or accident.

Although one may become a member of a conspiracy without full knowledge of all the details, a person who has no knowledge of or intent to join the conspiracy, but just happens to act in a way that is of benefit to the conspiracy or to a conspirator, does not thereby himself become a conspirator. Evidence of friendship or association, or even [107] familial relationship with alleged conspirators without evidence of knowing participation does not permit an inference of guilt.

Furthermore, a simple buyer-seller relationship alone does not make out a conspiracy. A buyer-seller relationship, however, may be sufficient if it's coupled with other evidence indicating a common purpose, such as an ongoing or continuing relationship, multiple sales, sales on credit or fronting, an awareness that the drugs purchased by the buyer are to be resold, or knowledge of a broader illegal venture. There can be no conspiracy if the only person the defendant conspires with is a government agent.

Additionally, where the quantity involved is sufficiently large, an inference may be drawn that an implicit agreement exists for one defendant to supply another defendant with narcotics for resale on an ongoing basis.

It is not necessary that the government prove that a defendant was a member of the conspiracy from its beginning. Different persons may become members of the conspiracy at different times. One who knowingly joins an existing conspiracy is charged with the same blame or culpability as though he had been one of the original members of the conspiracy. And you are reminded that it is not necessary in order to convict a defendant of a charge of [108] conspiracy that the objectives or purposes of the conspiracy were achieved or accomplished. The ultimate success or failure of the conspiracy is irrelevant. You must, of course, first determine whether the government has proved beyond a reasonable doubt that the conspiracy existed.

The defendants contend that the government's proof at trial is at variance from the conspiracy charged in Count One of the indictment; that is, that the evidence presented at trial, if believed, would constitute multiple conspiracies rather than a single overall conspiracy.

Whether a single conspiracy, multiple conspiracies or no conspiracy at all existed is for you to decide. If you find that the evidence at trial did not prove the existence of the single overall conspiracy charged or instead established other or different conspiracies, none of which are charged in the indictment, you must find the defendants not guilty of Count One. This is so even if you find that some conspiracy other than the one charged in the indictment existed, and even though the purposes of both conspiracies may have been the same and there may have been some overlap in membership.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment. What you must determine is whether the single conspiracy as charged in Count One existed between two or [109] more conspirators. If you find that no such conspiracy existed, you must acquit the defendants of this charge. If, however, you find the government has proved beyond a reasonable doubt that the defendants were involved at any point during the period charged in the indictment in an integrated, ongoing, common effort to distribute controlled substances, then you may find them guilty of the single conspiracy charged in Count One.

In making this determination, you should consider whether the conspirators share a common goal, such as to possess and distribute narcotics for profit; to enrich the members of the conspiracy; to create, maintain and control a market place for the distribution of controlled substances; to enforce discipline among members of the conspiracy; to collect monies owed to members of the conspiracy; to protect the conspiracy and its members from detection, apprehension and prosecution by law enforcement; to prevent and retaliate against acts of violence perpetrated against members of the conspiracy; and to promote and enhance the reputation and standing of the conspiracy and its members.

You may also consider the extent to which members of the conspiracy depended on one another to accomplish the goal of narcotics distribution, the overlap of participants in the various operations of the conspiracy, and the quality, frequency, and duration of each conspirator's [110] transactions.

You may find that there was a single conspiracy despite the fact that there were changes in either personnel or activities, or both, so long as you find that two or more persons continued to act for the entire duration of the conspiracy for the purposes charged in the indictment. The fact that members of a conspiracy are not always the same does not necessarily imply that separate conspiracies exist.

If you find that a single conspiracy existed, you will be obliged to consider the agency relationship among coconspirators. This is a concept you will encounter throughout much of your deliberations, as later instructions will demonstrate. Briefly stated, a member of a conspiracy who commits another crime during the existence or life of the conspiracy and who commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy if the other crime is reasonably foreseeable and in furtherance of the conspiracy.

The illegal actions of this person in committing this other crime may be attributed to others who are then members of the conspiracy; therefore, a defendant may be found guilty of this other crime even though he did not participate directly in the acts constituting that offense or was not present at its commission. In this connection, I [111] refer you to the Court's Instruction Number 37 on vicarious liability that I previously read to you.

You also may consider even non-criminal acts and the statements of any other member of the alleged conspiracy during and in furtherance of the conspiracy as evidence against a defendant whom you have found to be a member of it. When people enter into a conspiracy and thus act as agents for each other, the acts or statements of one conspirator during the existence of the conspiracy are considered the acts or statements of all the other conspirators and can be regarded as evidence against them all.

* * * *

# APPENDIX X — EXCERPTS OF TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED DECEMBER 9, 2002

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 00-157

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY, and LIONEL NUNN,

Defendants.

Washington, D.C.
Monday, December 9, 2002
1:45 p.m.

DAY 148 - PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE, and a jury

* * *

[3] **AFTERNOON SESSION** - (1: 45 p.m.)

[Jury charge]

THE COURT: Ladies and gentlemen, count three of the indictment charges the defendants Kevin L. Gray, Rodney L. Moore, John Raynor, Calvin Smith, Timothy Handy, and Lionel Nunn, with a specific form of conspiracy; that is a conspiracy to violate the law prohibiting racketeer-influenced and corrupt organizations, popularly known as the RICO statute. I will refer to it as such in these instructions.

The indictment charges that from sometime in 1988 up through and including in or about November 2000, defendants Rodney Moore and Kevin L. Gray headed a criminal organization which was based in the District of Columbia at various locations listed. And that the defendants were members of or associated with that enterprise, which engaged in drug trafficking and other activities affecting interstate commerce, [4] and that they participated in the conduct of the affairs of the enterprise through what is called a pattern of racketeering activity in violation of the RICO law.

A RICO conspiracy is a combination or agreement of two or more persons who join together to try to accomplish an offense that would be in violation of the RICO statute. The term “racketeering” in the RICO law is simply a term used in the statute and should not be regarded as having the negative implications popularly associated with that word.

I will now instruct you on the elements of RICO. To establish the offense of RICO conspiracy with respect to each defendant, the government must prove each of the following four elements beyond a reasonable doubt.

One, that an enterprise, in this case an illegal association, in fact, existed; two, that the enterprise engaged in or that its activities affected interstate commerce; three, that the particular defendant under consideration by you at the time knowingly and intentionally agreed with another person to conduct or participate in the conduct of the affairs of the enterprise.

And, four, that the defendant knowingly and wilfully agreed that he or some member of the conspiracy would commit at least two of the acts referred to as racketeering acts which constitute a pattern of racketeering activity in furtherance of the conspiracy.

[5] Proof of these four elements beyond a reasonable doubt is proof of a RICO conspiracy. Now I will discuss each of the elements in more detail.

The first element is that the government must prove the existence of an enterprise in order for you to find that the defendants are guilty of RICO conspiracy. The term "enterprise" includes a group of persons associated in fact, even though their association is not recognized as a legal entity such as a corporation or partnership.

A group of persons or association of persons can be an enterprise if these individuals have joined together for the purpose of engaging in a common course of conduct over a period of time.

I previously instructed you with respect to count one on application of the statute of limitations in determining the guilt of the defendants. I will now instruct you on the statute of limitations with respect to the RICO conspiracy alleged in count three.

If you find that the government has proven beyond a reasonable doubt that the RICO conspiracy charged in count three existed, you must also find that the conspiracy continued at a time within the statute of limitations.

I further instruct you as a matter of law that the applicable statute of limitations is five years. I further instruct you as a matter of law that the defendants Kevin L. [6] Gray, Rodney L. Moore, John Raynor, and Calvin Smith were charged with participating in this RICO conspiracy on May 5, 2000. And defendants Timothy Handy and Lionel Nunn were charged with participating in this RICO conspiracy on November 17, 2000.

If you find that the evidence at trial did not prove beyond a reasonable doubt the existence of the RICO conspiracy at a point in time continuing in existence within five years before May 5, 2000 for defendants Kevin L. Gray, Rodney L. Moore, John Raynor, and Calvin Smith, and November 17, 2000, for defendants Timothy Handy and Lionel Nunn, you must find the defendants not guilty of count one.

If, however, you find that the government has proven beyond a reasonable doubt that there was a RICO conspiracy, that the defendant was a member of that RICO conspiracy, and that the conspiracy continued in existence within five years before May 1, 2000 for defendants Kevin L. Gray, Rodney L. Moore, John Raynor and Calvin Smith, and November 17, 2000, for defendants Timothy Handy and Lionel Nunn, then you must find them guilty of the RICO conspiracy charged in count three.

* * * *

# APPENDIX Y — EXCERPTS OF TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE, DATED JANUARY 3, 2003

[1] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CR Number 00-157

UNITED STATES OF AMERICA,

Government,

v.

KEVIN L. GRAY, RODNEY MOORE, JOHN RAYNOR, CALVIN SMITH, TIMOTHY HANDY and LIONEL NUNN,

Defendants.

Washington, D.C.
Friday, January 3, 2003
11:54 a.m.

DAY 158 - AM SESSION
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

* * *

[4] PROCEEDINGS

THE DEPUTY CLERK: This is the case of The United States v. Kevin Gray, Rodney Moore, John Raynor, Calvin Smith, Timothy Handy and Lionel Nunn, Criminal Case Number 2000-157. Mr. Heaphy, Mr. Olsen, and Ms. Jeffress for the United States; Mr. Carter, Mr. Baugh, Mr. Coburn, Mr. McCool, Mr. Oyewole, Mr. Saunders, Mr. Carney, Mr. Lasley, Mr. O'Bryant and Ms. Holt for the defendants.

THE COURT: How does the United States propose to answer the three questions posed?

MR. OLSEN: Your Honor, during the time that we have been waiting, we've had both an opportunity to consult with our Appellate Division and also we have had some debate here in court among counsel.

Your Honor, we would ask for permission to respond after lunch. We do think that those questions -- they are complicated questions and we would like to do a little bit of research before we propose an answer to any of those three questions.

I think, from our informal discussion here in court with counsel, we don't agree in general with the defense about how to respond, but we would like to see if there is something more authoritative than just our sort of shoot-from-the-hip reaction to those questions.

THE COURT: All right.

[5] MR. OLSEN: So whenever the Court -- one-thirty, two o' clock, whichever is appropriate with respect to the jury's schedule, that's when we propose to respond.

MR. CARNEY: Your Honor, I have a doctor's appointment at two and I would probably be back by three.

We have discussed this pretty thoroughly with each other and we're of the opinion that this isn't controversial. All three should be answered yes. Looking at -- particularly with respect to Subparts (a) and (d) Question 1, it's only asking about use of the different types of drugs.

With respect to Count Three (RICO), does the statute of limitations apply to Racketeering Act 1? Racketeering Act 1 is conspiracy and you have given an instruction on that.

And then with respect to Number 3, it' s obvious that if defendant isn't within the statute of limitations, you have to find him not guilty, and I don' t think that any further -- unless they can point to something specifically that they shouldn't be instructed on their particular questions, I think that Your Honor should instruct them.

* * *

[9] MR. OLSEN: Your Honor, I can give the Court just very quickly why we think this is an ambiguous and complicated question.

The law is clear, as the Court found in the pretrial motions, that the statute of limitations does not apply to predicate acts or overt acts. So, for example, the statute of limitations does not apply to predicate acts under the RICO conspiracy. Counts that could not be charged substantively because they are barred by the statute of limitations can be charged as racketeering acts that form the predicate for the racketeering conspiracy. The statute of limitations applies to the charge of narcotics conspiracy and it applies to the charge of racketeering conspiracy, not to the underlying predicate acts. That's one point.

Second, the Court's own instructions on the third question about -- that suggests that a finding of a defendant leaving the conspiracy, the Court's instructions [10] on that point are -- I'm reading from the instructions -- "If you find with respect to any defendant that the government has proven beyond a reasonable doubt that there was a narcotics conspiracy, that the defendant was a member of that narcotics conspiracy, and that the conspiracy existed within five years of the relevant date, then you must find the defendant guilty."

That language suggests that the question -- the critical question is whether the conspiracy existed within five years and whether the defendant was at some point a member of that conspiracy.

Now, I am not suggesting that that's definitely the answer. That is just one -- that, I think, is a reading that follows from the Court's own instructions. We want a little bit of additional time to make sure that that's the right answer before we propose anything to the jury.

* * *

[14] Now, on the final question, Your Honor, the question on the -- how the jury should view a finding that a defendant left the conspiracy before the relevant date, we did do some research on this and there is case law in the D.C. Circuit and elsewhere.

In particular, there is a case we reference, it's an antitrust case in re Corrugated Container antitrust litigation in the D.C. Circuit from 1981, which states that -- it holds that the statute of limitations begins to run when a defendant affirmatively withdraws from a conspiracy.

Now, that question is sort of left unanswered by [15] the Court's instructions as the Court instructed the jury before it began its deliberations. There is nothing in those instructions about how to view withdrawal.

The jury note indicates that a defendant left the conspiracy. What we propose is to give the jury a statement as to the -- a correct statement as to the law that, for the purposes of determining the statute of limitations, they should look to either when, if at all, a conspiracy is over, when it's completed, or with respect to a particular defendant when that defendant withdraws from the conspiracy, and then to address the question of what that means, when they say when a defendant leaves the conspiracy, how to consider that question of what withdrawal means in the context of the conspiracy cases in the D.C. Circuit and in other circuits. For that, we rely -- we quote from the Court's own instruction -- I mean the Court's own order, again the February 7th order, in which the Court defines what withdrawal from a conspiracy means.

We think that these instructions are not only -- our instructions are not only consistent with the law and the Court's own ruling, but also are helpful to the jury in trying to answer these questions, which I think -- I do think they are much more complicated than the defense initially indicated. Obviously we don't agree on what the answer should be, but as I said, we've gone back to the [16] Court's own ruling from February 7th and to some cases to support our proposal.

THE COURT: Where do you get the last sentence in your third proposal?

MR. OLSEN: Your Honor, that comes from the Court's order and it's on page 63 of the Court's February 7th order, and it's a -- it cites the cases that are listed there --

THE COURT: The problem with volunteering that now when it's evidence, when it relates to the evidence gives me some pause that we're then commenting in some way on the evidence since it wasn't in the instructions.

MR. OLSEN: If the final sentence about incarceration alone is insufficient, that's a -- it is a statement of the law and it comes from the Gypsom case and from the Thomas case that we cite.

I mean, I do understand the Court's concern, but since it is a fair statement of the law and there has been evidence, obviously, about and with respect to Mr. Smith, his incarceration, so that's why we think it would be -- it's helpful to the jury, it helps address a concern that they obviously have expressed in this note.

I mean, there may be ways to accommodate concerns that Mr. Carney may have in terms of the actual language of that and we' re certainly willing to work with language that [17] -- if there's an issue with the fairness of that characterization, we can certainly work with that, but it does seem to us that it's appropriate to try to give the jury some guidance as to -- when they say a defendant left the conspiracy, just to leave it at that we think is not enough given that there is a body of law on what it means to withdraw, how to interpret withdraw from a conspiracy.

THE COURT: All right.

Mr. Carney.

MR. CARNEY: Your Honor, Mr. Carter wishes to respond.

THE COURT: All right.

MR. CARTER: Your Honor, the government's proposal is confusing, non-responsive, and a blatant attempt to amend this Court's instructions.

If I can take the last point first with regard to Question Number 3, the government was on full notice that the issue of statute of limitations was in play on both the first, the second and the third counts. They agreed to language on the statute of limitations. At no time did they offer this Court any language defining "withdrawal," and it was accepted by the Court as we proposed and given to the jury. The jury has not asked for what does withdrawal mean, and so therefore you are going beyond the question, and again, it's a blatant attempt to amend the jury's [18] instructions when they had full and clear opportunity to do so the first time. It is clearly improper, and it is non-responsive to the question asked.

The question asked is, if a defendant leaves the conspiracy outside of the relevant period for the statute of limitations, must we find him not guilty? The answer to that question is yes. The Court defines that.

Now, if the Court wants to say, "Please read the instruction on Count Number Three from beginning to end, please read the instruction as a whole, but the answer to your question is yes," that, it would seem to me, would be the proper response.

* * *

[25] MR. COBURN: With respect - - and this is probably the most important issue facing the Court -- with respect to Question 3, the jury inquires about this notion of what it means when a defendant, a particular defendant leaves the conspiracy. The government's response to this is to inject a new concept, to attempt to inject a new concept into this case, one on which, as Mr. Carter pointed out, the Court did not instruct and I don't think anyone,

in fact, requested that the Court instruct this notion of withdrawal from a conspiracy.

Everyone argued this case based on an understanding of what the instructions would be prior to argument. The government can't now change the landscape, they can't change the legal landscape by having the Court -- by seeking to have the Court instruct as to a new concept upon which nobody has had a chance to argue.

I mean, our argument would have been significantly different. We would have argued directly to that issue of withdrawal had there been a request for that instruction, [26] had the Court given it. So we would be severely prejudiced if that instruction were given at this time and we object to it.

Moreover, this notion of leaving the conspiracy is, in fact, within the gamut of the Court's instructions. While the Court does not ever specifically instruct on this concept of withdrawal from the conspiracy as it typically appears in the Red Book or other pattern instructions, there are quite a number of aspects of the Court's instruction with respect specifically to Count One that do, in fact, allow the jury to reason about the scope of the conspiracy this way; in other words, to conclude that because somebody leaves the conspiracy, that that would open up a limitations issue.

I would refer specifically -- I've got an excerpt of it here, Your Honor, and I think it starts, if Your Honor were to look at the printed version of the instructions on page 48, it's Roman Numeral II, Crimes Charged in

Indictment, Jury Instruction Number 41, Conspiracy to Violate Narcotics Laws, 21 U.S.C. Section 846.

On the second page of that instruction -- I guess it's page 49 in the printed packet -- under First Element, the Court told the jury, "Returning to the subject of Count One, you must consider separately the issue of each defendant's participation. Specifically, for you to find a [27] defendant guilty of conspiracy, the government must prove each of the following elements beyond a reasonable doubt," and the first element that the Court then goes on to tell the jury about says, first, that beginning sometime in 1988 and continuing until November 2000, an agreement existed between at least two people.

Then moving on down -- we're now on the third page; I guess it' s page 50 of the packet -- the Court instructed the jury, "It is not essential the government prove that the conspiracy began or ended on the specific date set forth in the indictment; the government is required to prove beyond a reasonable doubt, however, that the conspiracy charged existed in fact, existed in fact, for some time within the period set forth in the indictment."

And then specifically with respect to statute of limitations, the Court told the jury, "If you find that the government has proven beyond a reasonable doubt that the narcotics conspiracy charged in Count One existed, you must -- and this is the most critical aspect of it to us -- you must also find that the narcotics conspiracy charged in Count One continued at a point in time within the period of limitations," and then further down, at the very bottom of that section of the instructions, the Court says -- the Court refers specifically to each defendant. The Court's instructions stated, "I further instruct you as a matter of [28] law that defendants Kevin L. Gray, Rodney L. Moore and John Raynor, were charged with participating in the conspiracy." The Court gives the date, October 20th, '99. Then the Court says, "If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before October 20, '99, for Kevin L. Gray, Rodney L. Moore and John Raynor," and then the Court delineates the other defendants' applicable dates, and then the Court gives the converse. The Court says, "If, however, you find with respect to any defendant that the government has proven -- and the key phrase is "with respect to any defendant" -- that the government has proven beyond a reasonable doubt that there was a narcotics conspiracy and that the conspiracy continued in existence within five years before October 20th, '99, for defendants Kevin L. Gray, Rodney Moore and John Raynor."

I mean, that's what the jury is saying here. The jury is reasoning from that language that if a defendant leaves the conspiracy, and not necessarily invoking the classic withdrawal doctrine that the government now wants the Court for the very first time in the middle of deliberations to inject into this case, the jury is saying that if somebody leaves the conspiracy prior to the onset of the five-year limitations period, that the conspiracy within the scope of the language I just read to Your Honor did not [29] exist for that particular defendant. So there is no reason to inject this new concept. The jury has already got the concept quite properly in the instructions that Your Honor has given, and I'm referring specifically, Your Honor, to -- and I've got a copy of this case for the Court -- United States v. Lawrence LaSpina. This is a Second Circuit case from earlier in -- from July 2002.

This case specifically sanctions the doctrine that Your Honor's instruction was based on, this notion that the conspiracy -- and I'm just reading from the case -- must still have been ongoing within the five years preceding the indictment, and the Second Circuit talks about the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy and whether the act -- and then it goes into an overt act, which is inapplicable here.

This case, combined with the Court's language, makes it clear that if the jury finds this notion of leaving the conspiracy, the jury -- it' s the same thing as finding that the conspiracy didn't exist within the relevant limitations period for that particular defendant. There is no need to inject a new concept into this thing. And if the jury, in fact, so finds, then the statute of limitations does bar the prosecution for that conspiracy count, and the [30] answer to that question clearly is yes.

THE COURT: All right.

MS. HOLT: I will try not to repeat also, okay, because when I'm listening to the arguments, I actually think that what the government is suggesting that you do would be to create structural error, which we know is the most serious kind of error that there can possibly be, because basically what the government is asking you to do is to send in these sheets of papers with arguments the government wishes they had made, okay? And you can't -- that we can't do because we don't have an opportunity to respond to them. So that's where I think the structural error lies, and this absolutely cannot be done, because this is not instruction, what is here, it's not responsive to their questions, it's argument, okay?

* * *

[33] I think my structural error comment is just right in line with what the Court was saying when you looked at the government's sentence on Question Number 3, and so overall, I would just ask the Court to consider that what the government is asking us to do is structural and constitutional error and cannot be done without a serious default in the defendant's procedural rights that will affect him.

MR. CARNEY: Your Honor, I join in on my co-counsel's arguments. I add to these, first of all, the reason for statute of limitations being in this case is that Congress did not decide to exempt 371 and 848 from the statute of limitations.

With respect to the government's proposal for the third instruction, which is to essentially introduce a defense that I felt was prohibited based on Your Honor's earlier pretrial ruling, that because Mr. Smith was locked up, incarcerated, that there would have to be some type of affirmative showing that he withdrew from the case, there was no argument in closing argument by me as to that point, that he had withdrawn from it, there was no request for an instruction to do a withdrawal defense or argument, although the government did try, through Ms. Jeffress in rebuttal, to argue that there was a withdrawal based on a number of things that she outlined, including letter, canteen funds, [34] and further contacts with Kevin Gray. This was never any argument that I introduced, we did not argue withdrawal, and now, at this point, to ask for -- and there is a pattern instruction on withdrawal -- at this point, where I particularly did not have an opportunity after rebuttal, to now argue something new and to reintroduce it at this point in the case is truly unconstitutional and a denial of his due process rights.

We're all assuming that this note that's coming in is related to Calvin Smith, but it truly is related to all defendants in this case, particularly since there was a multiple-conspiracy argument, and I think that's what the jury is relying on and our arguments that we focused on that there was -- particularly Mr. McCool -- that there was a multiple conspiracy, and our argument, or at least mine, was that my client was never a member of the conspiracy, and that, not being a member of the conspiracy, the statute of limitations is there, but he was never a member of one single conspiracy. Where there was an argument that there were at least three different conspiracies from the case, I think that the jury could well, and we could envision that that's what they're doing, is trying to figure out what conspiracy and when the statute does run, if it runs.

With respect to the substantial prejudice, the defense case and argument already completed, no opportunity [35] to reargue, and the government trying on that third proposal to basically get in another type of prosecution here, I think is just -- I just haven't seen that.

* * *

[39] MR. OLSEN: Finally, Your Honor, with regard to the third request, I want to go back to the Court's instructions because I think the -- and I'm looking at page 51 of the Court's instructions. Mr. Coburn did not read a particular clause of this instruction when he read this to the Court.

This is about halfway down where the Court instructed that: If, however, you find with respect to any defendant that the government has proven beyond a reasonable doubt that there was a narcotics conspiracy -- that's the first element; that the defendant was a member of that narcotics conspiracy -- that's the second element, Mr. Coburn didn't read that; and then the third, that the conspiracy existed -- continued in existence -- excuse me -- within five years before those dates for those defendants. What is required for each defendant is that the conspiracy existed within five years -- that's the statute of limitations -- and that each defendant was a member of that conspiracy.

What that instruction does not provide the jury with any guidance on is this question that they raised in their third question: What happens if they find that a [40] particular defendant left the conspiracy? What does that mean when they say that a defendant left the conspiracy? Well, the law is -- there is a clear body of black-letter law and what it means to leave a conspiracy, and that is what we propose with respect to what it means to withdraw from a conspiracy. Those two terms are synonymous. There is no other place where the Court gives any guidance or instruction on what it means to leave a conspiracy. The jury has now raised that question for the Court. We propose that the Court make an effort to answer that question, what is required to find that a particular person left or withdrew from the conspiracy, and that is what we have attempted with the instruction we proposed with regard to Question Number 3.

* * *

[41] THE COURT: All right. The defendants' objections will be overruled and I will give the proposed instruction as proposed by the government except in the Response 1, I will delete the words "alleged overt act of the conspiracy or," and in the proposed response to 3, I will delete the last sentence. I will type a written response and send it in to the jury.

* * *

[46] MR. COBURN: Your Honor, just with respect to the language the Court proposes to use in response to the jury's third question, Your Honor, and I don't have the Red Book in front of me, I don't know if Your Honor does.

THE COURT: Yes.

[47] MR. COBURN: I think you do. But what the government has proposed is this notion of treating it just like an affirmative defense. I assume that's what the Red Book says about withdrawal. I don't know that for a fact.

THE COURT: Here, you can look at it if you want to.

MR. CARNEY: I don't think it's in the Red Book. My memory --

MR. COBURN: Okay. I'm told by Mr. Olsen that it's not, in fact, in the Red Book.

THE COURT: Okay. But it's in Devitt & Blackmar, or where?

MR. OLSEN: Your Honor, what we quoted from, and I'm showing Mr. Coburn and Ms. Holt a copy, is the Court's order from November 7th which defines "withdrawal."

MR. COBURN: But it doesn't say -- well, it does say the burden is on the defendant to prove withdrawal from the conspiracy, and Your Honor in this order cites United States v. Thomas, which is a D.C. Circuit case from '97. So I certainly am not in any position to quibble with that, but I would tell Your Honor that perhaps it would be appropriate, and we would, in fact, request, if Your Honor is going to use this language, that the jury be told that the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. I don't [48] think that the jury should be allowed to come away with the notion that we have to prove it beyond a reasonable doubt.

MR. CARNEY: Your Honor, I do not see it and I do not recollect it ever being in the Red Book.

THE COURT: Okay. I will add "by a preponderance of the evidence."

MR. CARNEY: Your Honor, based on what is now being proposed, I am going to move for a mistrial because it it's not -- it was an affirmative offense which I did not assert during the trial. The instruction being proposed by the government is being proposed over my objection.

THE COURT: Okay. That's denied.

* * *

[52] MR. CARNEY: Your Honor, Mr. Olsen and I both went up to the judges' library and we were unable to find Devitt & Black. The government did find Sand, which is used mostly in the Fourth Circuit, Maryland and West Virginia.

I really believe that I would rather have, if Your Honor is going to give this instruction over objection, Devitt & Black.

I note that the annotations to this instruction include language as to what preponderance of the evidence means in regard to -- for example, the defendant has the burden of proving that he withdrew from the conspiracy by a preponderance of the evidence. To prove something by the preponderance of the evidence means to prove that it is more likely true than not true. I mean, this is not an instruction that we had requested; it's one that the government is inserting here over our objection. I think that I would rather -- I would feel more comfortable relying on what our court has recognized. It may even very well be the same, but from my memory, I think there are subtle differences.

THE COURT: Then the request is I add that additional sentence defining "preponderance"?

MR. CARNEY: Yes, Your Honor. I have just two [53] other changes.

THE COURT: Okay.

MR. CARNEY: On Question 3 at the bottom of the page where the paragraph begins "Once the government has proven that the defendant was a member," I would ask to insert "of the single charge in the indictment" -- to add that "single charge conspiracy in the indictment," and then language to the effect, I guess after the next to last sentence before "Withdrawal must be unequivocal," language to the effect, "You should consider all the evidence as a whole, including any evidence submitted by the government."

Again, I didn't argue this in closing argument as to -- you know, I would have argued the government's case. I mean, I would have pointed to the Raymond Sanders incident in particular where he affirmatively said he wasn't going to be involved in doing any harm to him.

MR. LASLEY: Your Honor, I would ask the Court --

THE COURT: Wait a minute. I don't have straight what his proposal is.

The second proposal was "a single conspiracy"?

MR. CARNEY: Right. Once the government --

THE COURT: I reject that one. What is the next one, then?

MR. CARNEY: And the reason I do that is because --

[54] THE COURT: Well, they say narcotics or RICO conspiracy, so I don't want to get into going through all of them.

MR. CARNEY: The reason is I'm trying to accommodate this new argument. The argument that everyone made in closing was there was a multiple conspiracy, and it seems to me it's reflective of the jury's note of conspiracy, what conspiracy does the statute run from, and we've argued multiple conspiracy.

THE COURT: All right. That is rejected.

MR. CARNEY: Okay.

THE COURT: What is your other one?

MR. CARNEY: Then the other thing is, I would ask for language to the effect, "You should consider all of the evidence as a whole including any evidence submitted by the government." In other words, so it's not just that I've submitted something, I haven't argued that I submitted something, --

THE COURT: Right.

MR. CARNEY: -- but look at everything that has been submitted, and I think that could go right before the last sentence. Where you have "withdrawal must be equivocal," you can insert that there: "You should consider all the evidence as a whole, including any evidence submitted by the government." And then the other request [55] was define what "preponderance of the evidence" means.

THE COURT: All right. What is the government's position on those?

MR. OLSEN: Our position, Your Honor, is that's just unnecessary to remind the jury that they should consider all evidence with regard to any particular assertion, and it has been made, that instruction is clearly before the jury.

THE COURT: I have already told them that once. What about the defining "preponderance"?

MR. OLSEN: Your Honor, what I am going to pass up to the Court and what Mr. Carney read from is the Sand jury instruction. That has -- just so the Court has before it, I think that has the portion of it that defines "preponderance." That instruction is consistent with what we proposed. It's a little bit more detailed. We don't have an objection to that instruction itself being given.

The Court may note from looking at that that there is a split in the circuits as to how to instruct the jury as to the burden of proof on withdrawal. With several Circuits, it's -- the courts reminded that it's ultimately the government's burden to prove withdrawal beyond a reasonable doubt; in other circuits, there's more elaboration upon the meaning of "preponderance of the evidence."

[56] The D.C. Circuit, according to that, and that's a 2002 edition of that, the D.C. Circuit hasn't weighed in on that split. We don't have a problem with either, whatever defense would prefer as to how to instruct the jury on the burden of proof.

THE COURT: Well, if I give that whole addition, that takes care of your other point, too, because it says you can consider all the witnesses regardless of who may have called them, and it does repeat all that. So I could give that whole addition there. All right.

* * *

[57] MR. CARNEY: Your Honor, if I understood your instructions before to take a look at the cases cited by the government with respect to this matter, I've looked at U.S. v. Thomas and that does not deal with giving a withdrawal instruction over a defense objection. What it deal s with is a case where Andre Williams had made the argument at sentencing for not including drugs that he was not involved with, sort of a foreseeability argument that he had withdraw, therefore the Court should not credit him with those drugs when it figures his Sentencing

Guidelines. Likewise, I don' t think that Gypsom -- I didn't get a chance to look at the other case, the Corrugated Container antitrust litigation.

MR. COBURN: I read all three of them and my understanding of the way these cases operate is that at least some of the language that the government has proposed here is objectionable.

I don't know whether Your Honor is proposing or inclined now just to give the Sand & Seiffert instruction as opposed to the language the government proffered, but I did just want to -- whenever it's convenient for Your Honor, I just wanted to mention a couple of points about it.

THE COURT: Well, let me see what the government [58] is actually asking for now.

MR. COBURN: Just before I relinquish the podium, if I could, Your Honor, I just wanted to note that to the extent there are any circuits -- and, of course, we haven't had a chance to kind of poll them all, but to the extent there are any circuits that require proof beyond a reasonable doubt on the part of the government with respect to the withdrawal issue, we would urge the Court to adopt that doctrine. It seems to us to be constitutionally required.

Just to make sure I'm clear about this, Your Honor, this language the government proffers about "must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and those acts were communicated to the coconspirators in a manner reasonably calculated," that is not, in fact, what is reflected in Thomas, which is the most, I gather, the most recent law of the Circuit. Thomas says that it must -- a defendant must simply communicate abandonment in a manner reasonably calculated to reach the coconspirators. That's much more lenient language. That's what Thomas reflects. To the extent Your Honor is going to instruct that language, we would request -- moreover, I don't think any one of these three cases says that withdrawal must be unequivocal. Not one of them. And so we would object to that language as [59] well.

MR. OLSEN: Your Honor, in light of the objections, I mean, we -- what we have proposed we think is a fair statement of the law, but in light of those objections, we don't object to the instruction in Sand being given, and we don't object to the instruction given with the government burden beyond a reasonable doubt that's adopted by those circuits that have adopted it being given.

MR. COBURN: We haven't seen that, Your Honor, just to let the Court know.

MR. OLSEN: I can put it on the presenter, Your Honor, if that would speed things up.

THE COURT: Let me look at it first.

(Brief pause in proceedings.)

THE COURT: Well, I think what I originally approved for the government' s response I will adhere to, but I will add in this sentence from Sand that you can put on the presenter that has "to prove by a preponderance means," and you can show what that says and I will insert that.

MR. CARNE Y: Your Honor, I am going to join in on -- you know, after reflecting where we've gone from and where we are now, I will join in Mr. Coburn's objections.

[60] THE COURT: I'm just proposing to add to what I originally was going to give the part that I have circled, "To prove" something.

MR. COBURN: Would Your Honor -- I hope I'm not being repetitive here, but would Your Honor consider adding the Thomas language, at least in the disjunctive? I mean, perhaps it could be a phrase saying, you know -- the government's language about "acts inconsistent and communicating them or" -- I'll read it for the Court, because this is exactly what Thomas says, which is a 1997 case from this circuit: "or by communicating abandonment in a manner reasonably calculated to reach the coconspirators."

THE COURT: So you want to change "and" to "or"?

MR. COBURN: I wanted to add this additional phrase where I -- I would propose language that would say, "The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant' s coconspirators in a manner reasonably calculated to reach those coconspirators or that the defendant communicated abandonment in a manner reasonably calculated to reach the coconspirators," because you can communicate abandonment without taking an act inconsistent.

THE COURT: All right. What is the government's position on that language?

[61] MR. OLSEN: I think we should leave it as it is. We would object to that additional language. It seems duplicative of what is already there and it doesn't add to the jury's understanding of the law of withdrawal.

MR. COBURN: It isn't duplicative. I mean, the notion is, according to Thomas, if a defendant were to communicate verbally, for example, that he was abandoning the conspiracy, that would be sufficient under the case that they cite, under Thomas. I'm just -- I mean, I'm just parroting the language of that case. That's sufficient to constitute withdrawal from the conspiracy. You don't have to take an actual overt act inconsistent. That's not what Thomas says.

THE COURT: Do you have a copy?

MR. COBURN: Your Honor, I apologize, I don't. I was just reading it on the computer over the 20 minutes we had.

THE COURT: All right. Can you hand me back that paragraph?

What's the government's position on whether I have to read this to the jury?

MR. OLSEN: Your Honor, it seems to me that the Court has in its discretion to send this back as a written response to the jury's questions.

THE COURT: I don't see any reason to create an [62] issue over it, so the marshal will get the defendants dressed.

(Whereupon, a short recess was taken.)

(Whereupon, the jury enters the courtroom at 3:57 p.m.)

THE COURT: Good afternoon, ladies and gentlemen.

In response to your note from this morning, I'm going to send you back a written instruction, but I wanted to read it to you as well. Please look at my instructions as a whole in making your decision as to each of these matters. As to your specific questions today, here are my answers.

* * *

[63] And then Question 3 is: If we find that the narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?

My response is, you have asked a question regarding a defendant who leaves a charged conspiracy before the relevant date included in my instructions to you on the statute of limitations. The relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy.

I will now give you further instruction on the issue of what conduct constitutes withdrawal from a conspiracy. Once the government has proven that a defendant [64] was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing.

In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them.

If the evidence appears to be equally balanced or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant's coconspirators in a manner reasonably calculated to reach those coconspirators. Withdrawal must be unequivocal.

So with that instruction -- I will send you a written copy in -- I will ask you to continue your deliberations and I hope you find that responsive to your note. Thank you very much, ladies and gentlemen.

(Whereupon, the jury exits the courtroom at 4:01 p.m.)

# PETITIONER'S BRIEF

No. 11-8976

IN THE
# Supreme Court of the United States

CALVIN SMITH AND JOHN RAYNOR,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

# BRIEF FOR PETITIONERS

A. J. KRAMER,
FEDERAL PUBLIC DEFENDER
*Counsel of Record*
ROSANNA M. TAORMINA,
ASSISTANT FEDERAL PUBLIC DEFENDER
625 Indiana Avenue, N.W.
Suite 550
Washington, DC 20004
(202) 208-7500
A._J._Kramer@fd.org

*Counsel for Petitioners*

242742

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, due process requires that the burden of persuasion rests with the Government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

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## OPINION BELOW

The opinion of the D.C. Circuit affirming Petitioner's convictions is reported in *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), and is reproduced in the joint appendix to this brief at J.A. 10-167. The court's judgment is at J.A. 168-69. The order denying rehearing en banc is at J.A. 170-71. The relevant district court transcripts are reprinted at J.A. 181-329.

## JURISDICTION

The D.C. Circuit issued its opinion and judgment on July 29, 2011. Panel rehearing and rehearing en banc were denied on November 30, 2011. A timely petition for a writ of certiorari was filed on February 27, 2012. This Court granted the petition on June 18, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Also at issue is 18 U.S.C. § 3282, which stated at the time of Petitioner's indictment: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."[1]

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[1] The statute has been amended since Petitioner's indictment, but the amendments are not relevant to this case.

The text of 21 U.S.C. § 846 (controlled substances conspiracy) and 18 U.S.C. § 1962(d) (RICO conspiracy), the conspiracy statutes under which Petitioner was convicted, is reproduced in the addendum at the end of this brief.

## STATEMENT OF THE CASE

On November 17, 2000, a federal grand jury in the District of Columbia returned a 158-count indictment against Petitioner, Calvin Smith, and fourteen other defendants.[2] Petitioner was charged in fifteen counts of the indictment: one count of conspiracy to distribute controlled substances, 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846; one count of conspiracy to participate in a Racketeer Influenced Corrupt Organization ("RICO"), 18 U.S.C. §§ 1963, 1962(d); two counts of continuing criminal enterprise murder, 21 U.S.C. § 841(e)(1)(A); four counts of assault with intent to murder, 22 D.C. Code §§ 503, 3202, 105; four counts of first degree murder while armed, 22 D.C. Code §§ 2401, 3202; and three counts of using and carrying a firearm during a drug trafficking offense, 18 U.S.C. § 924(c).

### A. Pretrial

Petitioner moved to dismiss the two conspiracy charges, arguing that the five-year statute of limitations set forth in 18 U.S.C. § 3282 had expired.[3] Petitioner's primary contention was that he had been incarcerated from December 3, 1990, to March 9, 1993, and then again from June 1, 1994 to the date of the indictment. Having been incarcerated continuously for over six years before the indictment was filed, Petitioner argued that he was not a member of the charged conspiracies during the limitations period. The district court denied Petitioner's motion, reasoning that the grand jury had found probable cause "that the conspiracy continued into the five-year period covered by the statute of limitations, *and* that [Petitioner's] membership in the conspiracy continued into the five-year period." (J.A. 176-80 (emphasis added).) Petitioner proceeded to trial with five other defendants.

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[2] 2. Petitioner was charged in a superseding indictment. A number of the other defendants had been originally charged in an indictment filed on May 5, 2000, in which Petitioner was not charged.

[3] 3. The Government agreed pretrial that all the assault and firearms charges were committed outside the statute of limitations period, and the district court dismissed those charges.

### B. Trial

At trial, Petitioner's primary defense to the conspiracy charges was that he was not a member of the conspiracies within the five-year period preceding his indictment. Petitioner introduced a stipulation setting forth the dates of his imprisonment (J.A. 285) and testimonial evidence showing that he was no longer a member of the charged conspiracies during his incarceration.

The district court's jury instructions stated that the Government had to prove beyond a reasonable doubt that the charged conspiracies continued within the limitations period, but did not state that the Government also had the burden of proving each individual's membership in the conspiracies during that period. (J.A. 286-300.)

After deliberating for nearly twelve days, the jury submitted a note containing three questions relating to the statute of limitations issues and the conspiracy charges. The third question, which presented the issue in this case, asked:

> If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?

(J.A. 172.) This question resulted in an extensive colloquy between the court and the parties. (J.A. 301-29.) Petitioner argued that the jury's question should simply be answered "yes." (J.A. 303-08.) The Government proposed instead that the court instruct the jury on withdrawal from a conspiracy, placing the burden on the defendant to prove withdrawal. (J.A. 303-07.) Overruling Petitioner's objections, the district court agreed to give the Government's requested instruction. (J.A. 316.)

After further discussion, Petitioner requested that the district court instruct the jury that the Government had the burden of proof beyond a reasonable doubt on the withdrawal issue. (J.A. 323-25.) The Government, after noting that the circuits were divided on the allocation of the burden of proof on the withdrawal issue and that the D.C. Circuit had not "weighed in on that split," changed its position, stating that it did not "have a problem" with "whatever the defense would prefer as to how to instruct the jury on the burden of proof," and did not "object to the instruction given with the government burden beyond a reasonable doubt." (J.A. 322-24.)

Ignoring Petitioner's argument—and the Government's acquiescence—the district court gave the instruction originally proposed, placing the burden on the defendant to prove withdrawal by a preponderance of the evidence:

> My response [to Question 3] is, you have asked the question regarding a defendant who leaves a charged conspiracy before the relevant date included in my instructions to you on the statute of limitations. The relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy.
>
> I will now give you further instruction on the issue of what conduct constitutes withdrawal from a conspiracy. Once the government has proven that a defendant was a member of a conspiracy, *the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence.* To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them.

> If the evidence appears to be equally balanced or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant's coconspirators in a manner reasonably calculated to reach those coconspirators. Withdrawal must be unequivocal.

(J.A. 327-29 (emphasis added).)

Petitioner was convicted of seven of the eight counts on which he went to trial—he was acquitted of one of the enterprise murder counts—and sentenced to life imprisonment.

### C. The D.C. Circuit's Decision

On appeal, Petitioner argued that the district court's instruction violated his right to due process. Petitioner contended that, because it is the Government's burden to prove that a defendant was a member of the conspiracy during the limitations period, evidence that he withdrew before the limitations period negates that element of the offense; thus, the burden must rest with the Government to prove that the defendant did not so withdraw. In the district court, the Government agreed to such an instruction. On appeal, however, the Government argued that the district court's instruction was correct.

In its opinion, the court of appeals summarized what it characterized as a 5-5 split in the federal circuits on the burden of proof regarding withdrawal from a conspiracy: "While some have said that the burden of proving withdrawal always rests on the defendant, . . . others have held that, once the defendant meets his burden of production that he has withdrawn prior to the relevant limitations period, the burden of persuasion shifts to the government." *United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011) (internal citations omitted). Though the court recognized that due process requires the Government to prove each element of an offense beyond a reasonable doubt, *id.* at 89, the court noted that it was not "writ[ing] on a blank slate" because D.C. Circuit law held—"albeit in the context of sentencing"—that "the defendant, not the government, has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement." *Id.* at 90 (internal quotation marks omitted). Accordingly, the court concluded that it was "obliged" to follow precedent and upheld the district court's instruction.[4] *Id.*

## SUMMARY OF THE ARGUMENT

The district court's withdrawal instruction relieved the Government of its burden to prove beyond a reasonable doubt that Petitioner committed the charged conspiracy offenses within the statute of limitations period—the only period of time for which Congress authorized prosecution. The burden was instead placed on Petitioner to prove that he did *not* commit those offenses within the statutory period. Such burden shifting violated Petitioner's constitutional right to due process of law and requires reversal of Petitioner's conspiracy convictions.

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[4] The court affirmed Petitioner's conspiracy convictions, but remanded one of his murder convictions for proceedings on whether his counsel was ineffective with respect to that charge. 651 F.3d at 89.

When a defendant takes affirmative action to withdraw from a conspiracy, such withdrawal marks the end of his knowing and wilful participation in that conspiracy, directly negating the membership element of the offense. As to him, the crime of conspiracy is complete, triggering the statute of limitations. If the Government does not bring its prosecution within the requisite time period, the defendant's withdrawal becomes a complete bar to conviction, as he was not a member of a conspiracy—and therefore did not commit a crime—within the statutory period.

In order to be an actionable offense, a crime must have occurred within the period established by the statute of limitations. The express language of 18 U.S.C. § 3282 and this Court's jurisprudence dating back 200 years make clear that, once the statutory period expires, the Government simply has no power to prosecute. Criminal statutes of limitations thus define the parameters within which the government must prove that an offense occurred in order to obtain a conviction. Where the Government cannot meet this burden, the statute of limitations provides an absolute bar to prosecution.

As this Court has also long recognized, the Due Process Clause and presumption of innocence protect an accused against conviction except upon proof beyond a reasonable doubt of *every element* of the charged offense. The government's burden to prove that the charged offense occurred within the statute of limitations period is therefore, by definition, a burden to prove beyond a reasonable doubt each element of the offense within that period. Here, one of the elements the government was required to prove within the statutory period was Petitioner's knowing and wilful participation (or membership) in the charged conspiracies.

Because withdrawal and membership are mutually exclusive—i.e., withdrawal directly negates the membership element of a conspiracy offense—the district court's instruction, which placed on Petitioner the burden of proving that he withdrew from the charged conspiracies outside the limitations period, relieved the Government of its constitutional obligation to prove beyond a reasonable doubt the essential element of membership within that period. Such burden shifting violated Petitioner's due process rights and contravened the very policies Congress recognized when it established the statute of limitations upon which Petitioner relies in this case.

## ARGUMENT

## I. ONCE IT EXPIRES, THE STATUTE OF LIMITATIONS IS AN ABSOLUTE BAR TO A CRIMINAL PROSECUTION.

### A. Statutes Of Limitations For Criminal Offenses Date From The Nation's Founding.

In *Stogner v. California*, 539 U.S. 607, 615 (2003), this Court recognized that criminal statutes of limitations "reflect a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." Such a legislative judgment was made not only by the Congress that passed the current version of 18 U.S.C. § 3282, but also by the First Congress. Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 Wm. & Mary L. Rev. 199, 249 n.222 (1995). Preceding even the ratification of the Bill of Rights, Congress passed the first general criminal statute of limitations on April 30, 1790.[5] *Id.* Similar statutes had made their appearance in colonial America as early as 1652. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630, 631 (1954) (hereinafter "*Penetrable Barrier*").

General criminal statutes of limitations were not a part of the English common law, wherein the doctrine *nullum tempus occurrit regi*—no lapse of time bars the

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[5] As part of "An Act for the Punishment of certain Crimes against the United States," the First Congress provided:

> And be it further enacted, That no person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offense aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: Provided, That nothing herein contained shall extend to any person or persons fleeing from justice.

Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119.

King—survives to this day.[6] *Id.* at 630; *see also* Adlestein, *supra*, at 253-55; *Developments*, *supra*, at 1179. As a result, "instances . . . frequently occurred in which parties ha[d] been convicted and punished many years after the crime had been forgotten." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 160 (1819). In contrast, civil law countries, whose criminal statutes of limitations are said to derive from Roman Law, have long diverged from England's practice in this regard. *Penetrable Barrier*, *supra*, at 631; *see also Developments*, *supra*, at 1179; 2 Sir James F. Stephen, *A History of the Criminal Law of England* 1-2 (1883) (characterizing England's lack of a criminal statute of limitations as "one of the peculiarities of English law"). The enactment of such statutes so early in the Republic thus represents the Founders' direct rejection of English common law in this area. *Penetrable Barrier*, *supra*, at 631 & n.7.

Evidence that criminal statutes of limitations have long been a part of the American system of justice can be found in this Court's opinions as early as 1805. In *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805), the Court considered whether the country's first criminal statute of limitations extended to actions of debt for the recovery of penalties imposed for violations of a penal statute. In holding that the limitations statute did apply, Chief Justice Marshall observed:

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[6] Parliament has specified limitations periods for a small number of crimes, *see* Adlestein, *supra*, at 254 (explaining that historically, Parliament exercised the power of limitation for criminal offenses "very sparingly"). For all other offenses, "the common law felon must depend on the forbearance of the authorities for freedom from prosecution for a crime long past," *Developments in the Law–Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1179 (1950) (hereinafter "*Developments*").

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. *This would be utterly repugnant to the genius of our laws.* In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

*Id.* at 342 (emphasis added); *see also id.* at 341 (words of statute evidence "intention, not merely to limit any particular form of action, but to limit any prosecution whatever").

The passage of time has only reaffirmed the importance of criminal statutes of limitations to the Nation's legal system. As this Court has recounted, the Reconstruction Congress of 1867—the Congress that drafted the Fourteenth Amendment—rejected a bill that would have revived time-barred prosecutions aimed at prosecuting Jefferson Davis and various leaders of the southern rebellion. *See Stogner*, 539 U.S. at 616. Even Radical Republicans opposed the bill, which ultimately did not pass, believing it "threatened an injustice tantamount to 'judicial murder.'" *Id.* (quoting Cong. Globe, 39th Cong., 2d Sess., 69 (1866-1867) (comments of Rep. Stevens)).

In 1914, this Court held that the general criminal statute of limitations—which, at the time was three years—applied to prosecutions for criminal contempts of an injunction despite the fact that such proceedings could not be instituted by indictment or information. *Gompers v. United States*, 233 U.S. 604 (1914), *abrogated on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968). Writing for the Court, Justice Oliver Wendell Holmes explained that "[t]he power to punish for contempt *must have some limit in time*, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government." *Id.* at 612 (emphasis added). After quoting Chief Justice Marshall's words in *Adams v. Woods*, Justice Holmes concluded, "[b]y analogy, if not by enactment, the limit is three years." *Id.*

In 1953, the Court in *Bridges v. United States*, 346 U.S. 209 (1953), narrowly construed the Wartime Suspension of Limitations Act, which tolled the general statute of limitations for certain offenses during wartime. Noting that the statutory exception was antithetical to the "longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," *id.* at 215-16, the Court held that the alleged crimes of the defendant, an accused Communist, were not covered by the Act, *id.* at 221, and thus the indictment "came too late to be effective," *id.* at 227. In reaching this conclusion, the Court relied on its precedent that federal criminal statutes of limitations must "be liberally interpreted in favor of repose." *Id.* at 216 (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

Seventeen years later, in *Toussie v. United States*, 397 U.S. 112 (1970), the defendant argued that his prosecution for failing to register for the military draft was barred by the five-year statute of limitations. *Id.* at 114. The issue was whether the offense was complete for statute of limitations purposes upon the defendant's initial failure to register or whether the crime continued to be committed each day he did not register. Again citing "the principle that criminal limitations statutes are to be liberally interpreted in favor of repose," *id.* at 115 (internal quotation marks omitted) (quoting, *inter alia*, *United States v. Habig*, 390 U.S. 222, 227 (1968)), the Court held that the offense was not a continuing one—and accordingly, that the statutory period began to run from the date the defendant initially failed to register, *id.* at 123. Though the Court stressed "the gravity of the offense" and acknowledged that there existed "cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws," it nonetheless recognized that the statute of limitations transcended these concerns. *Id.* For "while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations." *Id.* Under such circumstances, a court "must give effect to the clear expression of congressional will that in such a case 'no person shall be prosecuted, tried, or punished.'" *Id.* at 124.

### B. Statutes Of Limitations Represent The Judgment Of Congress That, After Passage Of The Prescribed Time, A Defendant May No Longer Be Prosecuted.

Criminal statutes of limitations, unlike their civil counterparts, are restrictions placed *on* the government *by* the government that expressly limit its power to execute the very laws it saw fit to pass. *Cf.* Bruce A. Antkowiak, *The Irresistible Force*, 18 Temp. Pol. & Civ. Rts. L. Rev. 1, 2 (2008) (noting that while the Framers "may have feared crime, . . . they feared the excesses of government even more"). As this Court has recognized, statutes of limitations "represent legislative assessments of [the] relative interests of the State and the defendant in administering and receiving justice." *United States v. Marion*, 404 U.S. 307, 322 (1971); *see also Stogner*, 539 U.S. at 615 ("[A] statute of limitations reflects a legislative judgment . . . ."); *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statute of limitations "is balance struck by Congress").[7] Congress is free to revisit these assessments at any time by either shortening or extending a given limitations period.[8] *See Toussie*, 397 U.S. at 123 ("We are not convinced that limiting prosecution to a period of five years following the initial failure to register [for the draft] will significantly impair either the essential function of raising an army or the prosecution of those who fail to register. . . . If Congress had felt otherwise it could easily have provided for a longer period of limitations. It has not yet done so.").

The legislative judgment favoring repose in the criminal context "typically rests, in large part, upon evidentiary concerns—for example, concerns that the passage of time has eroded memories or made witnesses or other evidence unavailable." *Stogner*, 539 U.S. at 615; *see also Marion*, 404 U.S. at 322 n.14 ("underlying rationale" of statutes of limitations is, *inter alia*, "to encourage promptness in bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory" (internal quotation marks omitted)). As this Court stated in *Toussie*, criminal limitations statutes are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[9] 397 U.S. at 114-15; *see also* F. Wharton, *Criminal Pleading and Practice* § 316, p. 210 (8th ed. 1880) (cited with approval in *Stogner*, 539 U.S. at 611) ("The statute [of limitations] is . . . an amnesty, declaring that after a certain time . . . the offender . . . may cease to preserve the proofs of his innocence."). Thus, the Court has deemed such statutes "'the primary guarantee against bringing overly stale criminal charges.'" *Doggett v. United States*, 505 U.S. 647, 665 (1992) (Thomas, J., dissenting) (quoting, *inter alia*, *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

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[7] Though *Kubrick*, *supra*, and *Wood v. Carpenter*, 101 U.S. 135 (1879), *infra*, are civil cases, this Court has cited both when discussing criminal statutes of limitations. *See, e.g.*, *Stogner*, 539 U.S. at 615-16. While "[t]he policies behind civil statutes of limitations are in many ways similar" to those behind their criminal counterparts, *Marion*, 404 U.S. at 322 n.14 (citing specific examples), there are significant procedural distinctions between civil and criminal statutes of limitations. Petitioner thus relies only on those civil law propositions that have been embraced by the Court in the criminal context.

[8] Congress cannot, however, revive previously time-barred offenses. *Stogner*, 539 U.S. at 632-33.

The result of Congress's balancing of interests, federal criminal statutes of limitations set forth a time period "beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion*, 404 U.S. at 322; *see also Stogner*, 539 U.S. at 615 ("[A]fter a certain time, no quantum of evidence is sufficient to convict."); *id.* at 616 (statute of limitations creates a "conclusive presumption forbidding prosecution"). Accordingly, this Court has consistently emphasized that, once expired, such statutes present an absolute bar to criminal conviction. In *Brown v. Walker*, 161 U.S. 591, 598 (1896), for example, the Court recognized that a statute of limitations defense is so unqualified as to extinguish an individual's Fifth Amendment privilege against self-incrimination. *Id.* ("[I]f a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer."). That is because "if the witness has already received a pardon, he cannot longer set up his privilege, since he stands, with respect to such offense, as if it had never been committed." *Id.* at 599. Only a statute "absolutely securing . . . immunity from prosecution would satisfy the demands of the clause in question." *Id.* at 595.

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[9] *Toussie* also recognized that "[s]uch a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." 397 U.S. at 115.

Most recently, in *Stogner v. California*, the Court held that it violated the *Ex Post Facto* Clause to revive and extend an expired limitations period to resurrect previously extinguished offenses.[10] 539 U.S. at 632-33. In so holding, the Court cited numerous authorities in support of the long-established principle that "'[a]n act condoned by the expiration of the statute of limitations is no longer a punishable offense.'" *Id.* at 613 (quoting H. Black, *American Constitutional Law* § 266, at 700 (4th ed. 1927)); *id.* at 619 (once limitation period expires, "[t]he State 'may be said' to be 'estopped from prosecuting'" (quoting H. Wood, *Limitation of Actions* § 13, at 43 (3d ed. 1901))); *id.* (criminal statutes of limitation are "'acts of grace or oblivion, and not of process,' 'extinguish[ing] all future prosecution' and making an offense unable to 'be again called into existence at the caprice of the prince'" (quoting 1 F. Wharton, *Criminal Law* § 444 a, at 347-48, n.b (rev. 7th ed. 1874))). As Henry Black stated in 1887:

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[10] Although the majority and dissent in *Stogner* strongly disagreed as to whether a statute extending an expired limitations period fits squarely within one of the categories set forth in *Calder v. Bull*, 3 U.S. 386 (1798), the dissent did not dispute the broader principle that—if not extended—an expired limitations period provides an absolute bar to criminal prosecution.

> For a statute which declares that, after the expiration of a given period, a man shall be confirmed in the presumption of his innocence, or, if he be guilty, that the State will surrender its right to visit him with the penalties of violated law, is an act of grace, an amnesty, a condonation of the prior offense. It is to be construed liberally and generously in favor of the offender. Its effect upon his status, as an innocent or guilty man, is therefore, in reality, the same as if he had secured a pardon from the executive or had received and fulfilled a sentence.

H. Black, *An Essay on the Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws* § 235, at 297-98 (1887).

An expired statute of limitations thus extinguishes potential criminal liability. As such, Congress has decided that a defendant's guilt or innocence is measured only by reference to the time period established—like the offense itself—by legislative enactment. Statutes of limitations therefore set the parameters within which the Government must prove that a crime occurred in order to obtain a conviction. *See Toussie*, 397 U.S. at 114 ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts . . . ."). Because the Government has no power to punish an offense completed outside those parameters, the law treats such offenses as if they had never been committed at all.

## II. THE GOVERNMENT HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT EACH ELEMENT OF THE CHARGED OFFENSE WITHIN THE APPLICABLE LIMITATIONS PERIOD.

Because a criminal statute of limitations defines the power of the Executive to act upon alleged violations of law, it is the Government—not the defendant—that must demonstrate its authority to prosecute an individual for the particular offense(s) charged. Though the defendant generally places the statute's expiration at issue, the *Government* bears the burden of proving that the charged crime was committed within the applicable limitations period, as this Court has long recognized.

In *United States v. Cook*, 84 U.S. 168 (1872), the Court held that it was procedurally improper to raise, via demurrer, a defense based on the statute of limitations in a criminal matter. In so holding, the Court explained, *inter alia*, that "the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, *to show that the offense was committed within two years* next before the indictment was found and filed." *Id.* at 180 (emphasis added); *see also id.* at 178-79 ("[D]emurrer is [not] a proper pleading where it will have the effect to shut out evidence properly admissible under the general issue to rebut the presumption of the supposed defect it was filed to correct."). It was thus the *Cook* Court's view that the Government had the burden of establishing at trial that the charged offense occurred within the limitations period. And because the issue would be determined "under the general issue," *id.* at 178-80, *Cook* established the broader principle that a statute of limitations defense goes directly to the merits of the prosecution's case. As the Court later recognized in *United States v. Barber*, 219 U.S. 72, 78 (1911), "the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant, the judgment is necessarily an acquittal of the defendant of the charge." The Court reiterated this tenet in *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), where it held that an unappealed dismissal on statute of limitations grounds bars subsequent indictment for the same offense: "It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence." The Court further explained:

> [A] judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another. *A plea of the statute of limitations is a plea to the merits.*

*Id.* at 87 (emphasis added).

As to the assignment of proof in cases in which a statute of limitations defense is raised, the Court in *Grunewald v. United States*, 353 U.S. 391 (1957), made explicit what *Cook* had implied. The petitioners in *Grunewald* argued that their conspiracy convictions were barred by the three-year statute of limitations. *Id.* at 397-98. The Court stated: "The indictment in these cases was returned on October 25, 1954. It was therefore *incumbent on the Government to prove* that the conspiracy, as contemplated in the agreement as finally formulated, was *still in existence* on October 25, 1951, *and* that at least one overt act in furtherance of the conspiracy was performed after that date."[11] *Id.* at 396 (emphasis added). *Grunewald* thus made clear that the Government must prove the existence of the charged offense *within the limitations period* in order to sustain its burden for conviction.[12] *Cf. United States v. Scott*, 437 U.S. 82, 115 (1978) (Brennan,

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[11] The *Grunewald* defendants' conspiracy charge was brought under 18 U.S.C. § 371, which makes commission of an overt act an element of the offense. In contending that their prosecution was barred by the statute of limitations, the defendants argued that the object of the alleged conspiracy "was attained and the conspirators' function ended" outside the limitations period. 353 U.S. at 398. None of the defendants claimed that they had withdrawn from the conspiracy before its goal had been attained; thus the element of individual membership was not at issue.

[12] Before *Grunewald*, in *Ledbetter v. United States*, 170 U.S. 606, 612 (1898), the Court held that omission of the specific date of a charged offense is not fatal to an indictment; but if a specific date is alleged, it is generally unnecessary for the Government to prove that the offense was committed on the exact date specified; "[o]rdinarily, proof of any day before the finding of the indictment, *and within the statute of limitations*, will be sufficient." *Id.* (emphasis added).

(continued)

J., dissenting) (statute of limitations is "traditional factual defense . . . which could be the basis for Rule 29 motions" examining sufficiency of evidence presented by the prosecution). There appears to be no dispute—except for the issue raised in this case—that this is the current state of the law.[13] *See generally Burden on State to Show that Crime was Committed Within Limitations Period*, 13 A.L.R. 1446 (2011 supp.) (listing and discussing federal and state cases).

The district court in this case seemed to acknowledge that the burden was on the Government to prove beyond a reasonable doubt that the crimes it charged extended to within the applicable limitations period; it did so, however, only half way. Although the district court set forth the two elements of the charged narcotics conspiracy and the four elements of the charged RICO conspiracy, it only instructed the jurors that they had to find the *first*

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The use of the word "unless" in § 3282—which states in relevant part, "[e]xcept as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed" (emphasis added)—also indicates that it is the Government's burden to prove that it instituted prosecution within the limitations period. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (stating the "general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits" (internal quotation marks omitted)).

[13] Thus, to the extent the statute of limitations is referred to as an "affirmative defense," such a label simply describes the method by which the defense is raised. It does not speak to the burden of persuasion attached to it.

element of each offense—the existence of a conspiracy and the existence of an enterprise, respectively—"within the statute of limitations" beyond a reasonable doubt. (J.A. 287-300.) The district court made no mention of the statute of limitations in relation to the remaining elements of the charged offenses, including the element that required the defendants' knowing and wilful participation. It was this omission that likely prompted the jury to ask whether a particular defendant could still be found guilty if he had left the charged conspiracies "before the relevant date under the statute of limitations." (J.A. 172.) Thus, it was the district court's initial failure to recognize that a criminal offense is the product of *all* of its elements that led to its incomplete instruction on the application of the statute of limitations and the erroneous supplemental instruction in this case.

It is axiomatic that in order to sustain a criminal conviction, the Sixth Amendment right to trial by jury and the Fifth Amendment's guarantee that no one will be deprived of liberty without due process of law "require . . . a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (emphasis added); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . ."); *Patterson v. New York*, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element."). This requirement "dates at least from our early years as a Nation," *Winship*, 397 U.S. at 361, and "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered,'" *id.* at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

The Government's burden to prove that a charged offense occurred within the statute of limitations period is, by definition, a burden to prove beyond a reasonable doubt each and every element of the offense *within that period.* Because the district court did not instruct the jury that the Government bore this burden—and instead placed the burden on Petitioner to disprove an essential element of the conspiracy offenses with which he was charged—Petitioner was denied due process.

## III. THE DISTRICT COURT'S WITHDRAWAL INSTRUCTION RELIEVED THE GOVERNMENT OF ITS BURDEN TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED CONSPIRACY OFFENSES WITHIN THE LIMITATIONS PERIOD BEYOND A REASONABLE DOUBT.

Petitioner was charged with participating in multi-member narcotics and RICO conspiracies. With respect to the narcotics conspiracy, the district court instructed the jury that the Government was required to prove two elements beyond a reasonable doubt: (1) "an agreement . . . between at least two people to commit a federal crime, namely to knowingly and intentionally distribute or possess with the intent to distribute [narcotics]" and (2) "that a particular defendant knowingly and willfully participated in the conspiracy and did so with the specific intent to distribute or possess with the intent to distribute [narcotics]." (J.A. 287-91.)

With respect to the RICO conspiracy, the district court instructed the jury that the Government was required to prove four elements beyond a reasonable doubt: (1) "that an enterprise . . . existed;" (2) "that the enterprise engaged in or . . . affected interstate commerce;" (3) "that the particular defendant under consideration by you at the time knowingly and intentionally agreed with another person to conduct or participate in the conduct of the affairs of the enterprise;" and (4) "that the defendant knowingly and wilfully agreed that he or some member of the conspiracy would commit at least two . . . racketeering acts . . . in furtherance of the conspiracy." (J.A. 298.)

Because the first element of the narcotics offense required an agreement between at least two people (neither of whom had to be the particular defendant under consideration) and the first element of the RICO offense required an enterprise (the existence of which did not require the participation of the defendant under consideration), the "membership" or "participation" element of both offenses was the only element that connected each individual defendant to either crime.[14]

As discussed above, the Government had the burden of proving beyond a reasonable doubt each element of its charged offense(s) *within the limitations period.* Petitioner claimed that he was not a member of the charged conspiracies within the limitations period—the only period of time in which the Government had the statutory authority to convict him. Because "[w]ithdrawal . . . directly negates the element of membership in the conspiracy during the period of the statute of limitations," *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981), the district court's instructions improperly relieved the Government of this burden.

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[14] For the RICO offense, the third and fourth elements may both be considered "participation" elements.

### A. A Defendant Who Withdrew From A Conspiracy Outside The Limitations Period Was Not A Member Of The Conspiracy Within That Period And Thus May Not Be Prosecuted.

A conspiracy is commonly defined as an agreement between two or more persons to engage in unlawful conduct. *See Pettibone v. United States*, 148 U.S. 197, 203 (1893) ("A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means[.]"). It is born into existence "as soon as the agreement is made," *United States v. Kissel*, 218 U.S. 601, 607 (1910), and generally "continues up to the time of abandonment or success," at which point the statute of limitations is triggered, *id.* at 608.[15] If the object of the conspiracy is to bring about a continuing result, the conspiracy itself will endure so long as at least two people intend and agree "to keep it up." *Kissel*, 218 U.S. at 607.[16] This allows the conspiracy to survive though its membership may change.

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[15] As this Court has consistently recognized, "the common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913)); *see also Bannon v. United States*, 156 U.S. 464, 468 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy[.]"); *Hyde v. United States*, 225 U.S. 347, 359 (1912) (same). In such cases, "the criminal agreement itself is the actus reus." *Shabani*, 513 U.S. at 16. Here, neither the narcotics or RICO conspiracies require an overt act for their violation.

While "a conspiracy" is an entity in and of itself, an individual's liability for conspiracy must be established independently. It is not until an individual knowingly and wilfully joins the unlawful agreement with the intent to further its objectives that criminal liability attaches. *See United States v. Hirsch*, 100 U.S. 33, 34 (1879) ("[I]t remains true that the combination of minds in an unlawful purpose is the foundation of the offence [of conspiracy], and that a party who did not join in the previous conspiracy cannot . . . be convicted[.]"); *Bannon v. United States*, 156 U.S. at 468 ("The gist of the offense is still the unlawful combination, *which must be proven against all the members of the conspiracy*, each one of whom is then held responsible for the acts of all." (emphasis added)). Thus, the Government must prove that an individual defendant separately demonstrated the requisite "meeting of minds and . . . intent," in order to sustain that defendant's conspiracy conviction. *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring); *see also* Rollin M. Perkins, *Perkins on Criminal Law* 629 (2d ed. 1969) ("[T]he conspirator's intent is always two fold," in that he must have the intent to agree with his co-conspirators and the intent to further the conspiracy's objective.).

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[16] As explained in more detail in *Kissel*:

> It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. . . . [W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, *and there is such continuous co-operation*, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one.

218 U.S. at 607 (emphasis added) (internal citation omitted).

This Court has acknowledged that the continuing offense doctrine is in tension with the statute of limitations and, because of this, has made efforts to limit its application. *See, e.g.*, *Toussie*, 397 U.S. at 115 ("[T]he doctrine of continuing offenses should be applied in only limited circumstances since . . . the tension between the purpose of the statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." (internal quotation marks omitted)). Nevertheless, at least since *Kissel*, conspiracies have been treated as continuing offenses for statute of limitations purposes.

The "membership" or "participation" element is critical to any conspiracy prosecution, as it is generally the only element that connects an individual defendant to "the conspiracy." Here, for example, the jury was instructed that in order to convict Petitioner of the narcotics conspiracy charge, the Government had to prove only two elements beyond a reasonable doubt: (1) that an agreement existed between two or more people—none of whom had to be Petitioner (the "conspiracy" element); and (2) that Petitioner at some point knowingly and wilfully participated in the conspiracy with the specific intent to further its objectives (the "membership" or "participation" element). Any individual's liability for conspiracy depends upon proof of the particular defendant's membership in the conspiracy, in addition to proof of the conspiracy itself.

During an individual's membership in a conspiracy, all reasonably foreseeable substantive offenses committed in furtherance of the conspiracy and within its scope are attributable to him, whether or not he directly participated in their commission. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946). But just as an individual can enter a conspiracy after its inception by joining a pre-existing agreement, he can also leave the conspiracy before its termination by withdrawing from that agreement. *Hyde*, 225 U.S. at 369 (acknowledging withdrawal allows conspirator "to avert a continuing criminality"). Withdrawal is accomplished through "some act to disavow or defeat the purpose" of the conspiracy and requires "affirmative action." *Id.* By removing himself from a conspiratorial agreement, an individual necessarily "weaken[s] the group which he has entered" and potentially dissuades others from further pursuing the conspiracy's objectives. *Developments in the Law–Criminal Conspiracy*, 72 Harv. L. Rev. 922, 957-58 (1959) (hereinafter "*Criminal Conspiracy*").

Withdrawal, by itself, is no defense to the crime of conspiracy, as no one can withdraw from a conspiracy who has not already committed the act of conspiring. But once a person does withdraw, he is no more responsible for the crimes committed in furtherance of the conspiracy that continues than for the crimes committed before he agreed to participate. *See Levine v. United States*, 383 U.S. 265, 266 (1966) (acknowledging Solicitor General's concession that "an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy"); *Pinkerton*, 328 U.S. at 645 (recognizing that, in order to hold a defendant criminally liable for the substantive offenses of his co-conspirators, the Government had to prove beyond a reasonable doubt that the particular defendant was a member of the charged conspiracy "*at the time those offenses were committed*" (emphasis added)); *see also Hyde*, 225 U.S. at 369-70 (an individual "must withdraw his support from [the conspiracy] *or* incur the guilt of [its] continuance" (emphasis added)). Withdrawal thus marks the end of an individual's membership in a conspiracy. As to that individual, the crime of conspiracy is complete, thus triggering the statute of limitations—the legal acknowledgment that the individual is no longer committing a crime.[17] *Hyde*, 225 U.S. at 369; *see also United States v. Irvine*, 98 U.S. 450, 452 (1878) (recognizing that statute of limitations begins to run when crime is complete).

Pursuant to § 3282, the Government has five years within which to prosecute an individual for his involvement in a narcotics or RICO conspiracy. Because withdrawal ends a defendant's knowing and wilful participation in the conspiracy, it negates that element of the offense. Thus, if an individual withdraws from a narcotics or RICO conspiracy five years (or more) before he is indicted, his withdrawal becomes a complete bar to the conspiracy charge(s), as the individual has committed *no crime* within the limitations period. *See Read*, 658 F.2d at 1233 ("[W]ithdrawal becomes a complete defense . . . when coupled with the defense of the statute of limitations."); *see also Stogner*, 539 U.S. at 632 (statute of limitations provides "complete defense to prosecution"). In such cases, Congress has expressly provided in § 3282 that "no person shall be prosecuted, tried, or punished."

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[17] There may also be other implications of withdrawal. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.4 (2d ed. 2011 update) ("Another possibility is that the defendant will rely upon his withdrawal as a means of limiting the admissibility against him of the subsequent acts and declarations of the other conspirators. It may also be significant whether a person other than the defendant has withdrawn from the conspiracy. The defendant, on the one hand, may wish to show that an overt act or a substantive crime was committed by a former co-conspirator only after that conspirator had withdrawn[.]" (footnotes omitted)).

### B. Requiring A Defendant To Disprove His Participation In A Conspiracy Within The Limitations Period Impermissibly Shifts The Government's Burden Of Proof With Respect To The Membership Element Of That Offense.

In any case in which a defendant asserts a statute of limitations defense, it is *always* the Government's burden to prove beyond a reasonable doubt that an offense occurred within the applicable limitations period. In this case, then, the Government was required to prove, *inter alia*, that Petitioner: (1) "knowingly and wilfully participated" in an established conspiracy with the intent to distribute or possess with intent to distribute narcotics; and (2) "knowingly and intentionally agreed . . . to conduct or participate" in the conduct of the affairs of an established RICO enterprise; *both* within five years of his indictment. The district court's withdrawal instruction erroneously shifted this burden of proof.

Before the jury began deliberating, the district court instructed the jury that the Government had to prove beyond a reasonable doubt "that the conspiracy charged existed in fact for some time . . . continuing within the period of the applicable statute of limitations." (J.A. 288; *see also id.* at 299 ("If you find that the government has proven beyond a reasonable doubt that the RICO conspiracy charged in count three existed, you must also find that the conspiracy continued at a time within the statute of limitations."); *id.* ("If you find that the evidence at trial did not prove beyond a reasonable doubt the existence of the RICO conspiracy at a point in time continuing in existence within five years before May 5, 2000[[18]] for defendant[] . . . Calvin Smith, . . . you must find the defendant[] not guilty of count [three].").) The district court did not instruct the jury that it had to find the other elements of the charged offenses within the limitations period, however. Thus, it was understandable that the jury asked whether it "must . . . find [a] defendant not guilty" if he "left the conspiracy before the relevant date under the statute of limitations." (J.A. 172.)

Two further points are important. First, the Government never contended, either in the district court or in the court of appeals, that Petitioner had not produced sufficient evidence to warrant a withdrawal instruction. In fact, it was the Government that first requested such an instruction after the jury sent its note. Second, in the district court, the Government ultimately agreed that it should be assigned the burden to disprove withdrawal—i.e., the burden to prove the element of membership within the limitations period—beyond a reasonable doubt. Despite this, the district court told the jury that "the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence." (J.A. 328.) This instruction relieved the Government of its burden to prove that Petitioner actually committed a crime (that of conspiring) within the statutory period. Instead, Petitioner was required to prove that he did *not* conspire within the relevant time period, i.e., he was required to prove his innocence. The Due Process Clause forbids this type of burden shifting.

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[18] This date was incorrect, as Petitioner was not indicted until November 17, 2000. The incorrect date, though, does not affect Petitioner's arguments before this Court.

In *In re Winship*, this Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. A corollary to this principle, as the Court recognized in *Patterson v. New York*, 432 U.S. 197 (1977), is that any statutory scheme or jury instruction that "shift[s] to the defendant the burden of *disproving* a fact necessary to constitute the crime . . . c[an]not coexist with *In re Winship* . . . and *Mullaney* [*v. Wilbur*, 421 U.S. 685 (1975)]." 432 U.S. at 203 n.9 (emphasis added); *see also Davis v. United States*, 160 U.S. 469, 487 (1895) ("[T]he burden of proof, as those words are understood in the criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime.").

In *Mullaney*, the Court struck down a state statutory scheme that effectively relieved the Government of its burden to prove malice aforethought, an element included in the State's statutory definition of murder. 421 U.S. at 686 n.3. The trial court instructed the jury that once the

Government proved that the homicide was both intentional and unlawful, malice was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. *Id.* at 686. If the defendant met this burden, he would be guilty only of manslaughter. *Id.* at 686-87. The instructions to the jury stated that "'malice aforethought and heat of passion on sudden provocation are two inconsistent things'; thus by proving the latter, the defendant would negate the former." *Id.* (internal citation omitted). This Court found the presumption of malice unconstitutional, as it "affirmatively shifted the burden of proof to the defendant" by requiring him to "prove the critical fact in dispute"—that he did *not* act with malice. *Id.* at 701. The statutory scheme thus violated the fundamental principle articulated in *Winship* "that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *Id.* at 685, 703.

The district court's withdrawal instruction in this case did *precisely* what the state statutory scheme did in *Mullaney*: It placed the burden on the defendant to disprove an essential element of the charged offense, effectively stating: "Participation and withdrawal are two inconsistent things"—thus by proving the latter, the defendant would negate the former. Further, like the statutory scheme in *Mullaney*, the district court in this case established a mandatory presumption that Petitioner knowingly and wilfully participated in the charged conspiracy during the statutory period unless he proved otherwise. As the Court made clear in *Patterson*, presumptions of this kind are inconsistent with due process:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

432 U.S. at 215; *see also, e.g.*, *Francis v. Franklin*, 471 U.S. 307 (1985) (mandatory presumption unconstitutional even though rebuttable); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (same).

Since *Mullaney*, the Court has reviewed various statutory schemes and jury instructions that placed the burden on the defendant to prove some aspect of his defense. Consistently, the Court has structured its *Winship* analysis as a comparison between the elements of the charged crime and the nature of the asserted defense. If the defense does not negate a statutory element, the Court has upheld placing the burden of proving that defense on the accused. In *Patterson*, for example, the Court reviewed a statute that placed the burden on the defendant to prove that he acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" in order to reduce his crime from second-degree murder to manslaughter. *Id.* at 198 n.2 (citing statute). The State defined second-degree murder as containing only two elements: (1) intent to cause the death of another person and (2) causing the death of such person or a third person. *Id.* at 198. Because the defense "d[id] not serve to negative any facts of the crime which the State is to prove in order to convict of murder," the Court held that the challenged statute did not offend *Winship*. *Id.* at 207; *see also id.* at 216 (noting that "nothing was presumed or implied against [the defendant]").

Consistent with *Patterson*, placing on the defendant the burden of proving affirmative defenses based on justification or excuse, without shifting the burden of proof with respect to an offense element, has been approved by this Court. *See Martin v. Ohio*, 480 U.S. 228, 233 (1987) (no violation of Due Process Clause where State placed burden on defendant to prove self-defense as justification; in doing so, State "did not seek to shift to Martin the burden of [dis]proving any of [the] elements [defining the crime of murder]"); *Dixon v. United States*, 548 U.S. 1, 5-7 (2006) (because Government "bore the burden of proving beyond a reasonable doubt [each element of the charged offenses]" and duress defense "in no way disproves an element of those crimes," permissible to place burden on defendant to establish excuse of duress). An affirmative defense based on justification or excuse may *relate* to an element of the offense (generally that of mens rea), but it does not necessarily negate it; i.e., the element and the affirmative defense can coexist. Such affirmative defenses "constitute[] . . . separate issue[s]" altogether—they stand in contrast to an assertion by the defendant that the Government cannot meet its burden of proof with respect to a specific element of the charged offense. *Patterson*, 432 U.S. at 207. Affirmative defenses of this type are essentially admissions that, even if the Government can meet its burden of proof as to each element of the offense within the statutory period, there is something more the jury should consider that might justify or excuse culpability. *Martin*, 480 U.S. at 234 (even if Government proves each essential element, "the killing will still be excused if . . . the defense [is] satisfactorily established"); *id.* at 231 (defendant "did not dispute the existence of the[] elements, but rather sought to justify her actions on grounds she acted in self-defense").

By contrast, when a defendant asserts that he was not a member of a charged conspiracy during the statutory period because he withdrew from the conspiracy before the limitations period, he is not asking to be excused for an otherwise punishable offense; he is directly attacking the Government's proof that he committed a punishable offense in the first instance. If a defendant withdrew from a conspiracy more than five years before his indictment, he *necessarily* did not participate in that conspiracy within the statutory period—withdrawal and participation are thus mutually exclusive. Requiring the defendant to prove withdrawal outside the statutory period therefore relieves the Government of its burden to prove the essential element of participation within that period beyond a reasonable doubt. Simply put, withdrawal is not an affirmative defense—it directly negates an element of the offense. *Cf.* Jack P. Friedman, *Criminal Procedure–Alibi Instructions and Due Process of Law*, 20 W. New Eng. L. Rev. 343, 349-50 (1998) (explaining that alibi defense "represents a negation of an element of the crime itself, namely the actus reus," and therefore "differs fundamentally from an affirmative defense," because affirmative defenses, "if successful, release[] the defendant from criminal liability even if the prosecution proves all of the elements of the offense beyond a reasonable doubt").

In *Patterson* and its progeny, the Court repeatedly emphasized that the ultimate burden of proving each element of the statutory offense beyond a reasonable doubt always remains with the Government. *See, e.g., Patterson*, 432 U.S. at 200 & n.5 ("The trial court's instructions . . . focused emphatically and repeatedly on the prosecution's burden of proving guilt beyond a reasonable doubt" and the jurors were instructed to "[a]lways remember that you must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill."); *Martin*, 480 U.S. at 233 ("As in *Patterson*, the jury was here instructed that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated murder has been proved by the State beyond reasonable doubt, and that the burden of proof with respect to these elements did not shift.").

In those cases, as well, defendants were given the opportunity to attack the Government's proof, even if they could not meet their burden of establishing the specific affirmative defense at issue. In *Leland v. Oregon*, 343 U.S. 790, 791 (1952), for example—a case predating even *Winship*—the defendant had been charged with first-degree murder. The jury was instructed that the Government had to prove beyond a reasonable doubt that the defendant "did the killing purposely and with deliberate and premeditated malice." *Id.* at 793. The jury could also issue a verdict of "not guilty by reason of insanity" if the defendant proved beyond a reasonable doubt that he was legally insane at the time of the offense. *Id.* at 794. After "repeatedly emphasiz[ing]" the Government's burden to prove beyond a reasonable doubt every element of the charged crime, the trial court advised the jury that, even if the defendant's evidence did not meet the standard for legal insanity, it nevertheless should be considered in judging whether the Government had met its burden of proof with respect to every element of the charged offense. *Id.* at 794-95 & n.8. "The jurors were to consider separately the issue of legal sanity per se—an issue set apart from the crime charged[.]" *Id.* at 795-96. In light of these instructions, the Court found no violation of due process; for "[a]lthough a plea of insanity [wa]s made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including in the case of first degree murder, premeditation, deliberation, malice and intent." *Id.* at 794.

And, in *Martin v. Ohio*, where the Court upheld a state law requiring the defendant to prove that she acted in self-defense, the Court acknowledged that evidence offered to support the defense also tended to (but did not necessarily) negate the elements of the charged crime, aggravated murder. 480 U.S. at 234. The jury was not only permitted, but specifically instructed, to consider this evidence in deciding whether the prosecution had met its ultimate burden of proof with respect to the elements of the offense. *Id.* at 233.[19] This was critical, as "[e]vidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence." *Id.* at 234. Because the jury had been advised that "all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime," the Court found no due process violation. *Id.*

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[19] "To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by [the defendant] in connection with her plea of self-defense, raised a reasonable doubt that [the defendant] had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design." *Martin*, 480 U.S. at 233.

Had the *Martin* jury been instructed differently, the Court acknowledged that its decision would have been to the contrary:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate.

*Id.* at 233-34; *cf. Cool v. United States*, 409 U.S. 100, 103 (1972) (per curiam) (jury instruction that allowed jury to consider accomplice's testimony only if it was true beyond a reasonable doubt "places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt").

The *Martin* hypothetical effectively describes the withdrawal instruction the district court gave in this case. The jury here was never advised of the Government's burden to prove beyond a reasonable doubt that Petitioner himself participated in the charged conspiracies within the limitations period. The district court's response to the jury's note told the jury that as long as the Government proved that a particular defendant was a member of the conspiracy at some point in time, it was that defendant's burden to prove that he was *not* a member of the conspiracy *inside* the limitations period. And though the district court did instruct the jury that it "may consider the relevant testimony of all witnesses . . . and all the relevant exhibits received in evidence" (J.A. 328), the jury was told to consider such evidence solely "[i]n determining whether the defendant has proven that he withdrew from the conspiracy" (*id.*), not "in deciding whether there was a reasonable doubt about the sufficiency of the government's proof of the elements of the crime" within the limitations period, *Martin*, 480 U.S. at 234. Thus, under the court's instruction, any evidence that Petitioner did not participate in the narcotics or RICO conspiracies within the limitations period—and the lack of evidence on the Government's behalf—was only relevant to determining whether Petitioner could prove by a preponderance of the evidence that he was not a member of the charged conspiracies during the limitations period. Like the hypothetical instruction in *Martin*, the district court's instruction relieved the Government of its ultimate burden of proof and thus "plainly r[a]n afoul of *Winship*'s mandate." *Martin*, 480 U.S. at 234. Requiring a defendant to prove his innocence—that he withdrew from the conspiracy during the only period of time for which Congress has granted the Executive the power to prosecute him—violates the Due Process Clause.

### C. This Court's Opinion in *United States v. Hyde* Neither Mandates Nor Supports Placing The Burden Of Persuasion On A Defendant To Prove His Withdrawal.

Courts that require a defendant to disprove the participation/membership element of a charged conspiracy within the limitations period have done so claiming reliance on this Court's opinion in *Hyde v. United States*, 225 U.S. 347 (1912). But nothing in *Hyde* commands or even supports such a result. In that case, the defendants were charged with an overt-act conspiracy to defraud the United States. Though it was not alleged that one of the defendants, Schneider, had committed any of the overt acts specified in the indictment within the applicable three-year statute of limitations period, there was evidence that he nonetheless participated in the conspiracy well within the statutory period, during which time he sent a letter to the agency being defrauded confessing the fraudulent scheme. *Id.* at 369-71.

Schneider argued that because he had not, within three years of his indictment, participated in the commission of any of the overt acts charged, his prosecution was time-barred.[20] *Id.* at 367, 370-71. He claimed it was error for the trial court to instruct the jury that the overt acts of his co-conspirators within the limitations period could be attributed to him, even if he did not participate in those acts. 225 U.S. at 370-71; *see also* Brief for Petitioners at 19, 73, *Hyde v. United States*, 225 U.S. 347 (1912) (No. 447). In light of these arguments, the Court defined the question presented as addressing "the effect of overt acts by some of the accused in depriving the petitioners of the benefit of the statute of limitations." 225 U.S. at 356.

The Court concluded that it was not error to attribute the overt acts of a defendant's co-conspirators to that defendant for statute of limitations purposes unless the defendant withdrew his support from the conspiracy before commission of those acts. *Id.* at 369. In order to withdraw, however, the Court stated that "affirmative action" is required. *Id.* That a particular defendant does not himself commit an overt act within the limitations period is not alone sufficient. For in a continuing conspiracy that "contemplate[s] the performance of acts through a series of years," a defendant who "'remain[s] acquiescent, expecting and understanding' that further acts should be performed" is still "consciously offending" through the acts of others though he may not perform the acts himself. *Id.* at 368-69. By his continued acquiescence, the defendant remains an agent of his colleagues unless or until he "does some act to disavow or defeat the purpose" of the conspiracy. *Id.* at 369. The Court made clear, however, that its holding did not "take the defense of the statute of limitations from conspiracies." *Id.* at 369. Rather, it "allows it to all, but makes its application different" in requiring "affirmative action." *Id.*

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[20] 20. Schneider also contended that the statute of limitations should "begin[] to run from the last overt act within three years from the *formation* of the conspiracy," 225 U.S. at 368 (emphasis added), which the Court rejected under *Kissel*, *id.* at 369.

The *Hyde* Court ultimately found that although the defendant was not required to commit acts in furtherance of the conspiracy during the limitations period, his understanding of the scope of the conspiracy and his continued acquiescence—i.e., his continued membership—*were* required.[21] Though evidence of withdrawal would place membership at issue, the ultimate question remained whether the defendant continued to acquiesce in the conspiratorial agreement within the limitations period. The Government had produced evidence of sustained participation into the limitations period in *Hyde*. *Id.* at 368. Thus, the question of the defendant's original understanding and continued acquiescence in the conspiracy—the membership element of the crime with which he was charged—was "for the jury to determine." *Id.* at 372. The Court said nothing to suggest that the burden of persuasion would shift to the defendant on the question of whether he had continued to acquiesce or had, instead, taken affirmative action to withdraw.

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[21] One of the instructions the *Hyde* Court approved expressly stated that the defendant could be held liable for conspiracy based on the overt acts of others committed within the limitations period only "'so long as he continued acquiescent and those things were being done which he had contemplated and agreed should be done.'" Brief for Government at 77, *Hyde v. United States*, 225 U.S. 347 (1912) (No. 447).

The Court's review of other instructional issues in *Hyde* makes clear that it perceived a defendant's continued agreement to be necessary to his conviction. Schneider contended that the only overt acts charged within the limitations period were overt acts performed by others *after* he had sent his confession. If at least one overt act within the limitations period was necessary to keep the charge alive, he argued, his confession before the commission of that act should have barred his conviction. The Court rejected that argument and approved the trial court's instruction to the jury that, if it found the defendant made a disclosure to the government, it had to also consider his conduct after that disclosure "'as bearing on the question whether he was acquiescent,–what his attitude of mind toward the conspiracy was.'" 225 U.S. at 371. The instruction "submitted to the jury the effect of repudiation, and whether it was adhered to, *as evidence of [the defendant]'s further participation in the conspiracy* by the overt acts done subsequent to the date of his disclosure." *Id.* (emphasis added). According to the

Court, "the only question under the instruction is *whether there was an acquiescence* which embraced the later acts, and this, we think . . . was for the jury to determine." *Id.* at 371-72 (emphasis added).

The Court in *Hyde* thus viewed membership in the conspiracy within the limitations period as a jury finding required for conviction. Evidence of withdrawal would serve to raise a reasonable doubt as to the sufficiency of the Government's evidence when the statute of limitations is in play. Without evidence of withdrawal, the jury would be permitted to find that a defendant remained an active member of a live conspiracy within the limitations period. Nothing in *Hyde* suggests that placing the burden of production on the defendant also shifts the burden of proof.

Several of the first cases to interpret *Hyde* recognized this. In *Mansfield v. United States*, 76 F.2d 224, 229 (8th Cir. 1935), the court held, citing *Hyde*, that the jury need only

> find some evidence that would create a doubt in their minds as to whether or not the appellants remained in the scheme or conspiracy to defraud before they would be justified in acquitting them of the conspiracy on the basis of (withdrawal). It does not relieve the government of the burden of establishing their guilt beyond a reasonable doubt.

*Id.* at 230. And, in *Buhler v. United States*, 33 F.2d 382, 385 (9th Cir. 1929), the court held that implicit in the jury's guilty verdict on a conspiracy charge was a finding "beyond a reasonable doubt that appellant continued to participate in the alleged conspiracy" within the statutory period.

Eventually, though, *Hyde*'s "affirmative action" requirement somehow evolved such that some courts labeled withdrawal as an "affirmative defense" with the defendant bearing the burden of proof—requiring him to disprove his continued participation or membership in the conspiracy.[22] In *United States v. Read*, 658 F.2d 1225, 1235 (1981), the Seventh Circuit observed that "the *Hyde* rule that a defendant show some 'affirmative action' to trigger the withdrawal defense was transformed" improperly into placing the burden of "establishing withdrawal" on the defendant. In fact, nothing in *Hyde* suggests, much less dictates, the reading some courts have given it. Hyde dealt with the burden a conspirator bears *to take action* to end his crime and trigger the running of the statute of limitations and says nothing about the defendant having the burden to prove *at trial* that such action was or was not taken. Commentators witnessing *Hyde*'s transformation noted that the decision "might have been interpreted as merely shifting the production burden on the issue of withdrawal to the defendant, and leaving the persuasion burden with the state." *Criminal Conspiracy*, 72 Harv. L. Rev. at 958 (citing Note, 29 N.Y.U. L. Rev. 1470, 1473 (1954)). This, indeed, is not only the most reasonable interpretation, but also the only interpretation that avoids the burden-shifting held to be unconstitutional in cases like *Mullaney* and *Francis.*

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[22] Because withdrawal is not a defense of justification or excuse and instead directly challenges the Government's proof, the label "affirmative defense" does not in itself support such burden shifting. Indeed, the use of labels in place of legal analysis has been consistently rejected by this Court. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) ("Merely using the label 'sentencing enhancement' to describe the latter [aggravating fact] surely does not provide a principled basis for treating them differently."); *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004) (rejecting as "absurd" complete judicial deference to statutory labeling).

As with most defenses that challenge the Government's proof, the defendant—practically speaking—must introduce or identify evidence that would support his theory of defense and raise a reasonable doubt about his guilt. An alibi defense, for example, requires the defendant to produce at least some evidence for the jury's consideration, to be weighed against the Government's evidence that the defendant was in fact the perpetrator of the crime charged. Because an alibi defense—like the defense of withdrawal—is an element-negating defense (i.e., the same evidence that proves the defendant's guilt will necessarily disprove his alibi defense and vice versa), the burden does not shift to the defendant to prove his alibi by a preponderance of the evidence. Rather, alibi evidence is simply evidence that a defendant introduces to raise a reasonable doubt in the jurors' minds. *Hyde* merely requires, as a practical matter, that the defendant produce or identify evidence of "some act to disavow or defeat the purpose" of the conspiracy in order to put the issue of his continued membership before the jury. 225 U.S. at 369. In the absence of such evidence, the jury would be entitled to find that the defendant "remained acquiescent" so long as he knowingly and intentionally entered the conspiracy understanding that, even if not by him, "acts should be done from time to time through a series of years until the purpose of the conspiracy should be accomplished." *Id.* at 368. This is the most that *Hyde* commands.

Over sixty years after *Hyde*, the Court in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), was asked to review a withdrawal instruction in a non-overt act conspiracy case. The *Gypsum* defendants were charged with a price-fixing conspiracy and "vigorously argued throughout the trial" that competition within their industry had resumed before December 27, 1968, the relevant date for statute of limitations purposes. *Id.* at 465 n.38. In light of this argument, the defendants requested that the jury be permitted to consider that evidence to demonstrate their withdrawal from, or abandonment of, the price-fixing enterprise outside the limitations period. *Id.* at 464. The trial court refused the defendants' requested instruction and instead instructed the jury that:

> To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*
>
> Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

*Id.* at 463-64 (emphasis in original).

This Court disapproved of the trial court's instruction, as "the charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.* at 464. According to the Court, "[n]othing that we have been able to find in the case law suggests, much less commands, that such confining blinders be placed on the jury's freedom to consider evidence regarding *the continuing participation* of alleged conspirators in the charged conspiracy."[23] *Id.* (emphasis added). Again, as in *Hyde*, the Court implied that evidence of withdrawal was to be considered alongside the Government's evidence of participation in determining whether the Government met its burden of proof with respect to the defendants' continued agreement within the limitations period.

This is how the Court's *Gypsum* opinion was received by the court of appeals and both parties on remand. When the case returned to the Third Circuit, it reviewed the record for sufficiency of the *Government*'s evidence. *United States v. U.S. Gypsum Co.*, 600 F.2d 414, 416-18 (3d Cir. 1979). Noting that "[b]oth sides agree that we must test the sufficiency of the evidence using the standards established by the Supreme Court in this case," *id.* at 417 n.1, the court identified evidence of participation within the statutory period by each defendant, concluding that there were "sufficient acts in furtherance of the conspiracy committed in the statutory period to justify a jury in concluding that the agreement continued therein," *id.* at 418. The court, the defendants, and *the Government* all agreed that it was the Government's burden to prove—even in the context of a non-overt act conspiracy—the continued membership of each defendant within the limitations period in order to uphold the jury's verdict.

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[23] This language echoes the concerns expressed in *Leland* and *Martin* that a jury be permitted to consider all evidence relevant to the sufficiency of the Government's case. *See supra.*

As discussed above, the membership element of a conspiracy charge is the *only* element that connects an individual defendant to the harm conspiracy laws are aimed at punishing. As this Court has recognized, "[g]uilt . . . remains individual and personal, even as respects conspiracies." *Kotteakos v. United States*, 328 U.S. 750, 772 (1946). This is a cardinal tenet of due process with which the district court's instructions in this case failed to comply. Because "withdrawal negates the essential element of membership, it must be disproved beyond a reasonable doubt by the government." *Read*, 658 F.2d at 1236.

### D. Assigning A Defendant The Burden Of Proving His Withdrawal Outside The Limitations Period Is Directly At Odds With The Policies Underlying Criminal Statutes Of Limitations.

Placing the burden on the defendant to prove that he withdrew from a charged conspiracy over five—or even ten years, *see, e.g.*, 18 U.S.C. § 3293—before his indictment presents the very problems of proof that criminal statutes of limitations were designed to prevent. As discussed above, criminal statutes of limitations—and the "longstanding congressional 'policy of repose'" that they represent—are "fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 215-16. If criminal statutes of limitations "reflect a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict," *Stogner*, 539 U.S. at 615, it is a contradiction after such time has passed to place on the defendant the burden to prove by a preponderance of the evidence that he should not be convicted. *See also Wood*, 101 U.S. at 139 (statute of limitations creates "a presumption which renders proof unnecessary"). Such statutes are specifically "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie*, 397 U.S. at 114-15. The burden of producing affirmative evidence of innocence from outside the limitations period already stretches the statute's protections. *See* Note, 29 N.Y.U. L. Rev. at 1474 ("The formalistic requirement . . . that the withdrawing conspirator show an express act or statement of disavowal . . . places on the defendant the burden of proving an event which may have occurred many years before trial."). Requiring a defendant to convince a jury of his innocence during the statutory period abolishes those protections, as the evidence he would need to do so would, by necessity due to the definition of withdrawal, come from outside that period—a distance of time that Congress has decided would raise issues of fundamental fairness for the defense.

Moreover, placing the burden on the Government to disprove the defense places no additional burden on it. The Government must simply prove what it must prove in any event—that there was a conspiracy and that a particular defendant was a member of it within the limitations period. Indeed, in the present case, the Government, which agreed to an instruction that would have assigned it the burden of proof, never argued below that doing so would impose any hardship. And, on appeal, the Government argued that the district court's error was harmless in light of the affirmative evidence of participation within the limitations period it did produce at trial.

## IV. SHIFTING THE BURDEN OF PROOF TO PETITIONER WAS STRUCTURAL ERROR.

As argued in the court of appeals, the district court's burden-shifting withdrawal instruction was structural error under *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). In *Sullivan*, the trial court gave a defective reasonable doubt instruction, which violated the defendant's Fifth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt. In words equally applicable to the burden-shifting instructional error here, the Court concluded that the erroneous reasonable doubt instruction was not subject to harmless-error analysis because an "instructional error [that] consists of a misdescription of the burden of proof, . . . vitiates *all* of the jury's findings." *Id.* at 281. Thus, the *Sullivan* Court held that the denial of the right to a jury verdict of guilt beyond a reasonable doubt, which produces "consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.* at 281-82. Here, the jury was effectively instructed to convict if it was fifty percent convinced—rather than convinced beyond a reasonable doubt—that Petitioner was a member of the conspiracy within the statute of limitations period. Petitioner's conspiracy convictions could thus rest on a determination by the jury that Petitioner was not even *probably* guilty of committing offenses for which the Government had the power to punish him. Accordingly, the withdrawal instruction here, like the instruction in *Sullivan*, "vitiate[d]" the jury's findings on the withdrawal issue and "def[ies]" harmless-error analysis. This Court should therefore reverse Petitioner's conspiracy convictions as structural error and remand for consideration of whether such reversals taint Petitioner's substantive convictions under *Pinkerton*. *See Moore*, 651 F.3d at 90-94 (discussing role of *Pinkerton* liability in sustaining Petitioner's substantive convictions).

Alternatively, the case should be remanded to the court of appeals to determine in the first instance the harm caused by the due process violation, an issue it did not address as it upheld the instruction.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded.

Respectfully submitted,

A. J. KRAMER,
FEDERAL PUBLIC DEFENDER
*Counsel of Record*
ROSANNA M. TAORMINA,
ASSISTANT FEDERAL PUBLIC DEFENDER
625 Indiana Avenue, N.W.
Suite 550
Washington, DC 20004
(202) 208-7500
A._J._Kramer@fd.org

*Counsel for Petitioners*

Dated: August 20, 2012

# ADDENDUM

# ADDENDUM — RELEVANT STATUTES

## 21 U.S.C. §§ 841(a)(1)
## Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

## 21 U.S.C. § 846
## Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## 18 U.S.C. § 1962
## Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

# RESPONDENT'S BRIEF

No. 11-8976

# In the Supreme Court of the United States

CALVIN SMITH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
LANNY A. BREUER
*Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
SARAH E. HARRINGTON
*Assistant to the Solicitor General*
STEPHAN E. OESTREICHER, JR.
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether, when a defendant adduces evidence that he withdrew from a criminal conspiracy outside the applicable statute-of-limitations period, the burden of persuasion should be on the government to prove beyond a reasonable doubt that the defendant did not withdraw, or on the defendant to prove by a preponderance of the evidence that he did withdraw.

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# In the Supreme Court of the United States

No. 11-8976

CALVIN SMITH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (J.A. 10a-167a) is reported at 651 F.3d 30.

### JURISDICTION

The judgment of the court of appeals was entered on July 29, 2011. A petition for rehearing was denied on November 30, 2011 (J.A. 170a-171a). The petition for a writ of certiorari was filed on February 27, 2012, and was granted on June 18, 2012, limited to question two presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-2a.

## STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy to distribute narcotics and to possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; murder in connection with a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(e)(1)(A); and three counts of murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (Supp. 1995). Judgment, 1:00-cr-00157-RCL Docket entry No. 2183, at 1 (D.D.C. May 11, 2005) (Judgment). Petitioner was sentenced to concurrent terms of life imprisonment on each of the conspiracy and CCE murder counts, and to concurrent terms of imprisonment of 25 years to life on each of the three counts of murder while armed, all to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed petitioner's conspiracy convictions and two of his convictions for murder while armed.[1] J.A. 10a-167a.

1. The question presented in this case concerns petitioner's conspiracy convictions under 21 U.S.C. 846 and 18 U.S.C. 1962(d). Section 846 makes it unlawful to "conspire[] to commit any offense" under, *inter alia*, 21 U.S.C. 841(a)(1), which in turn makes it unlawful "know-

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[1] The court of appeals held (J.A. 120a) that petitioner presented a "colorable claim" that his trial counsel had rendered ineffective assistance as to the two counts associated with the murder of Anthony Dent. Concluding that "the current record does not conclusively resolve [the] claim," the court remanded those two counts "to the district court so that it may hold an evidentiary hearing and address [the] claim in the first instance." J.A. 124a; see J.A. 114a-124a, 153a.

ingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 1962(d) makes it unlawful to "conspire to violate" RICO, which in turn makes it unlawful to, *inter alia*, "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity," where the enterprise "engage[s] in" or "affect[s]" "interstate or foreign commerce," 18 U.S.C. 1962(c). Neither 21 U.S.C. 846 nor 18 U.S.C. 1962(d) contains its own limitations period. Section 3282(a) of Title 18 provides a five-year limitations period for noncapital federal crimes.[2]

2. Petitioner was convicted of being part of a large drug organization that distributed heroin, cocaine, crack cocaine, and marijuana throughout Washington, D.C., from the late 1980s through 2000. J.A. 12a. Petitioner and other members of the organization committed numerous acts of violence—including 31 murders—to further the goals of the conspiracy. *Ibid.* For example, petitioner was convicted of murdering Eric Moore by shooting him to death in his own bedroom closet. J.A. 107a. As the court of appeals noted, "the superseding indictment and evidence at trial ma[d]e clear that one of the principal goals of the drug conspiracy was killing to enhance the conspiracy's power, protect the reputation of the conspiracy and its members, and collect money owed to the conspiracy." J.A. 136a.

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[2] At the time of petitioner's indictment, Section 3282 did not contain subsections. The full text of that version of Section 3282 now appears without alteration in Subsection (a) of Section 3282. Compare 18 U.S.C. 3282 (2000) with 18 U.S.C. 3282(a) (2006). For ease of reference, this brief refers to Section 3282(a).

In January 1994, petitioner was arrested for shooting Maurice Willis, an act that was charged as part of the conspiracy in this case. Second Superseding Indictment, 1:00-cr-00157-RCL Docket entry No. 102, at 18 (D.D.C. Nov. 17, 2000) (Superseding Indictment); 7/2/02 p.m. Trial Tr. 12-25, 30-35; see J.A. 183a-184a. Petitioner ultimately pleaded guilty to a felony in connection with that incident and was incarcerated for that crime. J.A. 183a. Petitioner confessed to a co-conspirator that he had agreed to the plea so that Kevin Gray, who was a leader of the drug organization and was also involved in the Willis shooting, would be charged with only a misdemeanor offense. J.A. 192a. Gray rewarded petitioner for pleading guilty by giving him marijuana and money while incarcerated and by sending money to petitioner's wife. J.A. 185a, 199a-200a, 262a-264a, 266a-268a.

Although petitioner has been incarcerated continuously since June 1994, see J.A. 285a, his relationship with Gray continued after that date. In 1997, for example, petitioner informed Gray about a rumor that one of their co-conspirators was an informant. J.A. 254a-260a. Also in 1997, Gray directed petitioner to murder a government witness who was also incarcerated in prison, although petitioner declined to carry out that order. See J.A. 187a-190a. Finally, during the trial in this case (*i.e.*, in 2002), petitioner and two associates threatened a cooperating witness in the courthouse cellblock. J.A. 207a-248a.

3. a. On November 17, 2000, a federal grand jury returned a 158-count second superseding indictment charging petitioner and 16 co-conspirators with a narcotics conspiracy, a RICO conspiracy, murder, and related offenses, in violation of federal and District of Colum-

bia law. Superseding Indictment 1-159; see J.A. 12a. As relevant here, petitioner was charged with conspiracy to distribute narcotics and to possess narcotics with the intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A); RICO conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; murder in connection with a CCE, in violation of 21 U.S.C. 848(e)(1)(A); and three counts of murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (Supp. 1995).[3]

b. Before trial, petitioner filed a motion to dismiss the narcotics conspiracy and RICO conspiracy counts, arguing that those charges were barred by the five-year limitations period in 18 U.S.C. 3282(a). See J.A. 177a-178a. The district court denied the motion, explaining that "the Government has alleged—and the Grand Jury found probable cause to believe—that the conspirac[ies] continued into the five-year period covered by the statute of limitations, and that [petitioner's] membership in the conspirac[ies] continued into the five-year period." J.A. 179a-180a.

c. Petitioner and five other defendants were tried before a jury in a trial lasting more than ten months. J.A. 12a. At the conclusion of the trial, the district court instructed the jury that, in order to prove that petitioner and his co-conspirators were guilty of the conspiracy charges, the government had to prove beyond a reasonable doubt that each defendant "knowing[ly] and willful[ly] particpat[ed] in * * * an agreement [that] existed between at least two people to commit a federal crime"—either distribution of narcotics, possession of narcotics with the intent to distribute them, or a RICO violation. J.A. 287a (narcotics conspiracy); see J.A. 297a (RICO conspiracy). The judge also instructed the jury that it should convict petitioner of conspiracy if it found that the government had "proven beyond a reasonable doubt that there was a [narcotics or RICO] conspiracy, [petitioner] was a member of that [narcotics or RICO] conspiracy, and that the conspiracy continued in existence within five years before * * * May 5th, 2000." J.A. 289a; see J.A. 300a; see also J.A. 289a ("If you find that the evidence at trial did not prove the existence of the narcotics conspiracy at a point in time continuing in existence within five years before * * * May 5th, 2000 * * * , you must find [petitioner] not guilty of" the narcotics conspiracy);[4] J.A. 299a-300a (same for RICO conspiracy). The court also specified that "the government must prove beyond a reasonable doubt * * * that a particular defendant knowingly and willfully participated in the conspiracy and did so with the specific intent to" commit the identified narcotics or RICO violations. J.A. 290a, 298a.

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[3] As petitioner notes (Br. 2 & n.3), he was also charged with using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), and assault with intent to murder, in violation of D.C. Code § 22-503 (1989) and § 22-3202 (Supp. 1995). Those charges were dismissed before trial because petitioner committed the offenses outside of the five-year limitations period.

During the jury's deliberations, it returned a note asking the district court: "If we find that the Narcotics or RICO conspiracies continued after the relevant date under the statute of limitations, but that a particular defendant left the conspiracy before the relevant date under the statute of limitations, must we find that defendant not guilty?" J.A. 174a. After consulting with counsel, the court responded that "[t]he relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy." J.A. 328a. Over the defense's objections, see J.A. 307a-327a, the court then explained "what conduct constitutes withdrawal from a conspiracy" and who bears the burden of persuasion on whether a particular defendant has withdrawn from a charged conspiracy:

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[4] The court's instruction used the date of the first superseding indictment, which was filed on May 5, 2000, but did not charge petitioner. Petitioner was charged on November 7, 2000, in the second superseding indictment. Petitioner neither challenges the misstatement nor identifies any prejudice resulting from it, conceding instead that it "does not affect [his] arguments before this Court." Br. 32 n.18.

> Once the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing.
>
> In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them.
>
> If the evidence appears to be equally balanced or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. The defendant must meet his burden by showing that he took affirmative acts inconsistent with the goals of the conspiracy and that those acts were communicated to the defendant's coconspirators in a manner rea-

> sonably calculated to reach those coconspirators. Withdrawal must be unequivocal.

J.A. 328a.

The jury found petitioner guilty of the charges enumerated above (see p. 5, *supra*), including the narcotics and RICO conspiracies. Judgment 1.

4. The court of appeals affirmed in relevant part. It rejected petitioner's argument that the district court erred by instructing the jury that petitioner bore the burden of proving by a preponderance of the evidence that he withdrew from the narcotics and RICO conspiracies. J.A. 124a-127a.

The court recognized that "[c]onspiracy is a crime that presumes continuity until accomplishment or termination," such that "once a defendant becomes a member of a conspiracy, he remains a member until he affirmatively withdraws or the conspiracy ends." J.A. 126a (citing *Hyde* v. *United States*, 225 U.S. 347, 368-370 (1912)). "[O]nce the government proves that a defendant was a member of an ongoing conspiracy," the court observed, "it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws." *Ibid.*

In view of those principles, the court perceived the question before it to be "whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of the conspiracy such that the government must prove that the defendant did not so withdraw." J.A. 126a. The court acknowledged that the courts of appeals are divided about which party bears the burden of persuasion on whether a defendant has withdrawn from a conspiracy, though all circuits at least require a defendant to meet a burden of production on the issue of withdrawal. J.A. 126a-127a. The court adhered to circuit precedent holding, "albeit in the context of sentencing, that the defendant, not the government, 'has the burden of proving that he affirmatively withdrew from the conspiracy if he wishes to benefit from his claimed lack of involvement.'" J.A. 127a (quoting *United States* v. *Thomas*, 114 F.3d 228, 268 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997)). The court therefore "h[e]ld that the district court correctly instructed the jury that [petitioner] bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period." *Ibid.*

## SUMMARY OF ARGUMENT

A. The government proved beyond a reasonable doubt every fact necessary to convict petitioner of the conspiracy crimes with which he was charged when it proved that he knowingly and willfully agreed to participate in the relevant conspiracies and that the conspiracies existed within the time specified by the applicable statute of limitations. Once an individual joins a conspiracy, he is criminally liable for belonging to the conspiracy and for any acts taken by co-conspirators in furtherance of the conspiracy's goals even if the individual takes no overt action related to the conspiracy after agreeing to join.

Congress has separately provided a general five-year statute of limitations in 18 U.S.C. 3282(a), which requires the government to initiate a prosecution within five years after an offense was committed. It is well established that conspiracy is a continuing offense that is "committed" on an ongoing basis until accomplishing its goals. The government was therefore required to prove in this case that the charged conspiracies existed within the five-year period before the filing of the operative indictment. It is true that an individual member of a conspiracy may commence the running of a limitations period as to him, even when the relevant conspiracy continues to exists, by withdrawing from the conspiracy. To accomplish withdrawal, however, a defendant must not only end his involvement with the conspiracy, but also take some affirmative action that is inconsistent with the objectives of the conspiracy: making a clean breast to authorities or communicating his withdrawal to co-conspirators. In the absence of such affirmative action on the part of a defendant, he remains a member of the conspiracy for as long as it exists regardless of whether he overtly reaffirms (through words or deeds) his membership.

B. Within the limits of due process, Congress has the authority to assign the burden of persuasion on any affirmative defense as it sees fit. Where, as here, Congress does not specify in a statute which party should bear that burden, this Court must determine what Congress would have intended in the context of the particular offense at issue. Here, all relevant indicators point in the same direction: when Congress enacted the conspiracy statutes at issue here in 1970, it would have expected a defendant to bear the risk of nonpersuasion on the issue of withdrawal. At common law, a defendant bore the burden of persuasion on all affirmative defenses. And for 70 years after this Court first articulated the defense of withdrawal from a conspiracy, federal courts consistently allocated the burden of persuasion on that defense to defendants. Although the Court has held that, when raised, the statute of limitations requires the government to prove that the charged conspiracy existed within the limitations period, tradition does not support imputing to Congress an intent that the government *disprove* a defendant's affirmative defense to his continued membership in the conspiracy.

C. Substantial practical reasons justify allocating to a defendant the burden of persuasion on a defense of withdrawal. Withdrawal requires a defendant to take affirmative action inconsistent with the conspiracy and can be accomplished by abandoning the conspiracy and clearly communicating such action to co-conspirators. The defendant and his co-conspirators will therefore be in a better position than the government to adduce evidence relevant to the issue of withdrawal. Indeed, the government is particularly ill-equipped to prove the absence of withdrawal given its inability to compel conspiracy defendants to testify about their activities. And, while a conspiracy defendant will presumably know whether he intends to assert a withdrawal defense, he is under no obligation to notify the government of that strategy. If the government bears the risk of nonpersuasion on that issue, a defendant could easily scuttle the government's ability to investigate a withdrawal claim, let alone disprove it beyond a reasonable doubt. Requiring the defendant to bear the burden of persuasion, in contrast, discourages spurious assertions of withdrawal and properly balances the rights of a defendant and public safety.

D. Requiring a defendant to bear the burden of persuasion on the affirmative defense of withdrawal also comports with the requirements of the Due Process Clause. This Court has repeatedly made clear that, as long as the government proves beyond a reasonable doubt every fact necessary to establish that he committed a crime, Congress need not require the government to disprove any available affirmative defense. Petitioner seems to suggest that it is an "element" of the crime of conspiracy that a defendant have committed some overt act of membership within a particular time frame. That is incorrect. If that were the case, the government would have to prove that in every conspiracy case, regardless of whether a defendant claims to have withdrawn. Even petitioner does not go that far. Nor does a withdrawal defense negate any element of a conspiracy charge. The opposite is true: a defendant cannot withdraw from a conspiracy that has already concluded or that he had not already joined.

E. Finally, even if petitioner were correct that the district court should have instructed the jury that the government had the burden of proving beyond a reasonable doubt the absence of withdrawal, such error would not be structural. This Court has previously analyzed similar instructional errors under the harmless-error standard and petitioner conceded in his certiorari-stage pleadings that the harmless-error standard would apply here. And in this case ample evidence rebuts any evidence petitioner could produce in support of a *prima facie* case of withdrawal.

## ARGUMENT

### THE COURT OF APPEALS CORRECTLY INSTRUCTED THE JURY THAT PETITIONER BORE THE BURDEN OF PERSUASION ON THE AFFIRMATIVE DEFENSE THAT HE WITHDREW FROM A CONSPIRACY OUTSIDE THE STATUTE-OF-LIMITATIONS PERIOD

The Due Process Clause requires the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [a defendant] is charged" in order to secure a conviction. *In re Winship*, 397 U.S. 358, 364 (1970). It does not, however, require the government to "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); see *Martin* v. *Ohio*, 480 U.S. 228, 234-235 (1987). Although a legislature may choose to allocate the burden of persuasion on an affirmative defense to the government by statute, Congress has not opted to require the government to bear the risk of nonpersuasion with respect to the affirmative defense of withdrawal from the conspiracy crimes charged in this case. Here, the government proved beyond a reasonable doubt every fact necessary to establish that petitioner committed the charged conspiracy crimes. Those showings carried the government's burden to establish petitioner's guilt on those crimes; the burden to show that he withdrew from the conspiracies outside the limitations period fell on petitioner.[5]

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[5] The term "burden of proof" has been used to refer to two distinct concepts: "the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (citing *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994)). The issue in this case concerns the allocation of the burden of persuasion. Every court of appeals that has considered the question has held that the initial burden of producing evidence of withdrawal is properly placed on the defendant. See, *e.g.*, *United States* v. *Steele*, 685 F.2d 793, 804 (3d Cir.), cert. denied, 459 U.S. 908 (1982); *United States* v. *Green*, 599 F.3d 360, 368 n.9 (4th Cir.), cert. denied, 131 S. Ct. 271 and 131 S. Ct. 340 (2010); *United States* v. *Read*, 658 F.2d 1225, 1236 (7th Cir. 1981); *United States* v. *Grimmett*, 236 F.3d 452, 454 (8th Cir. 2001); *United States* v. *Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992); cf. *United States* v. *Bailey*, 444 U.S. 394, 415 (1980) (defense of duress or necessity in a prison-escape case requires the defendant to "proffer evidence" on the ingredients of the defense). Petitioner does not challenge that rule. See Br. 45-47.

### A. The Government Established Every Element Necessary To Secure Petitioner's Conviction On The Charged Conspiracy Counts

In establishing criminal sanctions, it is the province of the legislature to define the elements of a statutory crime. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). In order to secure a conviction under 21 U.S.C. 846, Congress requires the government to prove beyond a reasonable doubt that a defendant knowingly and willfully participated in an agreement with at least one other person to commit certain drug offenses. See *United States* v. *Shabani*, 513 U.S. 10, 13-16 (1994). And, in order to secure a conviction under 18 U.S.C. 1962(d), Congress requires the government to prove beyond a reasonable doubt that a defendant knowingly and willfully participated in an agreement with at least one other person to commit a RICO violation. *Salinas* v. *United States*, 522 U.S. 52, 63-65 (1997). As petitioner concedes (Br. 26 n.15), neither offense requires proof of an overt act in furtherance of the conspiracy. *Shabani*, 513 U.S. at 15; *Salinas*, 522 U.S. at 65. Petitioner does not dispute that the government proved beyond a reasonable doubt that petitioner knowingly and willfully participated in the charged narcotics and RICO conspiracies.

Petitioner instead relies on the five-year limitations period separately provided in 18 U.S.C. 3282(a). But petitioner misunderstands the import of the limitations period as applied to the charged conspiracies. This Court has made clear that a statute of limitations period begins to run upon the completion of a crime. *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970). A conspiracy is a continuing offense that is not complete until it has come to "full fruition" through the "accomplishment" of its objectives. *Hyde* v. *United States*, 225 U.S.

347, 369 (1912); see *Toussie*, 397 U.S. at 122 (noting that conspiracy requiring overt acts "continues as long as the conspirators engage in overt acts in furtherance of their plot"); *United States* v. *Kissel*, 218 U.S. 601, 608 (1910) (a "conspiracy is a partnership in criminal purposes" that "may have continuation in time," as "shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act"). Thus, the limitations period does not begin to run on a conspiracy until the goals of the conspiracy have been attained, rendering the conspiracy complete. As applied to the crimes charged in this case, Section 3282(a) therefore required the government to prove that the charged conspiracies continued to exist within the five years preceding the filing of the operative indictment. *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957).

Petitioner does not dispute that the government proved beyond a reasonable doubt that the narcotics and RICO conspiracies of which he was a knowing and willful participant continued to exist within the limitations period. He argues instead that the government was required to prove beyond a reasonable doubt that petitioner himself committed some affirmative or overt act of "participation" in the conspiracy within the limitations period.[6] Petitioner is incorrect. It is true that an individual member of a conspiracy may start the running of a limitations period as to his participation in a conspiracy by withdrawing from the conspiracy. But he may not accomplish such withdrawal or trigger the commencement of the limitations period except by taking some "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369. "Mere cessation of activity is not enough to" establish withdrawal and "start the running of the statute [of limitations]; there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); see, *e.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 & n.38 (1978) (action was sufficient to establish withdrawal when it was "inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators"); *United States* v. *Davis*, 682 F.3d 596, 613 (7th Cir. 2012) ( In order to withdraw from a conspiracy, a criminal defendant must take some affirmative act of withdrawal, such as confessing to the authorities or communicating his withdrawal to his co-conspirators."); *United States* v. *Randall*, 661 F.3d 1291, 1294-1295 (10th Cir. 2011) (in order to establish withdrawal, conspirator must either "give authorities information with sufficient particularity to enable the authorities to take some action to end the conspiracy" or "communicate his withdrawal directly to his coconspirators in a manner that reasonably and effectively notifies the conspirators that he will no longer be included in the conspiracy * * * in any way").

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[6] Petitioner never specifies what type of evidence the government could rely on to prove a particular defendant's continued "membership" in an ongoing conspiracy. Presumably, he would require proof either of an overt act in furtherance of the conspiracy or of an overt declaration of continued membership.

Unless or until a conspirator affirmatively withdraws from a conspiracy, he remains a member for as long as the conspiracy continues to exist and is criminally liable not only for belonging to the conspiracy, but also for any contemplated or reasonably foreseeable acts taken by co-conspirators in furtherance of the conspiracy's objectives. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-648 (1946); see also John Wilder May, *The Law of Crimes* § 89, at 99 (1881) (noting common law rule that each conspirator "is responsible for all acts of his confederates, done in pursuance of the original purpose"). But the government is not required to prove that a particular member of a conspiracy had recently or contemporaneously made an overt declaration (through words or deeds) of his continued membership at the time of his co-conspirator's action in order for the action to be attributable to him. Nor need the government prove such an overt declaration in order to establish that a defendant remains part of an existing conspiracy. "[A]s at the first moment of [a conspirator's] confederation, and consciously through every moment of [the conspiracy's] existence," a conspirator is continuously offending even when he neither acts in furtherance of the conspiracy nor reaffirms his membership—until he withdraws from the conspiracy or the conspiracy accomplishes its goals. *Hyde*, 225 U.S. at 369.

In sum, the government established the elements of conspiracy under Sections 846 and 1962(d)—and proved facts to satisfy Section 3282(a)'s five-year limitations period—by proving beyond a reasonable doubt that petitioner knowingly and willfully participated in narcotics and RICO conspiracies and that those conspiracies existed within the five years preceding the government's filing of the operative indictment.

### B. Congress Allocated To The Defendant The Burden Of Proving That He Withdrew From A Conspiracy Outside The Limitations Period

Within the limits of the Due Process Clause (see pp. 32-45, *infra*), Congress may allocate the burden of persuasion with respect to affirmative defenses as it sees fit. Where, as here, Congress does not specify in a statute whether an affirmative defense is available and, if so, who must bear the risk of nonpersuasion, courts must "effectuate the [particular] affirmative defense * * * as Congress 'may have contemplated' it in an offense-specific context." *Dixon* v. *United States*, 548 U.S. 1, 17 (2006) (quoting *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 n.3 (2001)). The question is quintessentially one of congressional intent and requires a determination of what Congress would have understood the relevant background legal principles to be at the time it enacted the statute in question. *Id.* at 8-16; see *id.* at 17 (Kennedy, J., concurring) ("When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition.").

1. As this Court noted in *Dixon* v. *United States*, "it bears repeating that, at common law, the burden of proving 'affirmative defenses—indeed, "all . . . circumstances of justification, excuse or alleviation"—rested on the defendant.'" 548 U.S. at 8 (quoting *Patterson*, 432 U.S. at 202, and 4 William Blackstone, *Commentaries on the Laws of England* 201 (1769)); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 693 (1975). The Court in *Martin* v. *Ohio* explained that: "[T]he common-law rule was that affirmative defenses, including self-defense,

were matters for the defendant to prove. 'This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified.'" 480 U.S. at 235 (quoting *Patterson*, 432 U.S. at 202). That common-law rule "accords with the general evidentiary rule that 'the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.'" *Dixon*, 548 U.S. at 8 (quoting 2 John W. Strong, *McCormick on Evidence* § 337, at 415 (5th ed. 1999) (*McCormick*)). Indeed, "until the end of the 19th century, common-law courts generally adhered to the rule that 'the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule.'" *Ibid.* (quoting George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 898 (1968)).

Even for statutes that explicitly contemplate an affirmative defense in a statutory proviso (which Sections 846 and 1962(d) do not), the Court acknowledged in *Dixon* that the "settled rule in this jurisdiction [is] that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and that it is incumbent on one who relies on such an exception to set it up and establish it." 548 U.S. at 13 (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)) (alterations in original); see *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841)). In the context of the defense of withdrawal, moreover, the common-law rule "accords with the doctrine that 'where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.'" *Dixon*, 548 U.S. at 9. As in *Dixon*, the

Court should "assume" that the Congress that enacted Sections 846 and 1962(d) in 1970[7] "was familiar with * * * the long-established common-law rule * * * and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law." *Id.* at 13-14; see *id.* at 18 (Kennedy, J., concurring) (acknowledging the Court's reliance on "the state of the law at the time the statute was enacted," and emphasizing the need to consider "guiding principles upon which Congress likely would have relied").

2. In 1912, this Court settled the question whether a defense of withdrawal should be available to a charge of conspiracy in *Hyde*, holding that a conspirator may invoke such a defense to start the running of the statute of limitations by taking an affirmative act of withdrawal. 225 U.S. at 369. In the wake of the *Hyde* decision, and for about 70 years thereafter, the federal courts of appeals to consider the matter consistently interpreted *Hyde* as placing on a defendant the risk of nonpersuasion as to the defense of withdrawal.[8] See, *e.g.*,

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[7] In 1970, Congress enacted 21 U.S.C. 846 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, § 406, 84 Stat. 1265, and 18 U.S.C. 1962(d) as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. IX, § 901(a), 84 Stat. 941-943.

[8] Although this Court has not opined on which party should bear the risk of nonpersuasion as to the withdrawal defense established in *Hyde*, it did have occasion to comment on the operation of that defense in a civil context. In *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U.S. 293 (1934), this Court considered various objections to an injunction entered in a civil suit brought by the United States following a successful criminal prosecution for conspiracy to violate the Sherman Act. The Court rejected the defendants' contention that they had abandoned the conspiracy before

*United States* v. *Chester*, 407 F.2d 53, 55 (3d Cir.) ("a defendant must prove an affirmative action * * * to disavow or defeat the purpose of the conspiracy") (internal quotation marks and brackets omitted) (alteration in original), cert. denied, 394 U.S. 1020 (1969); *Borelli*, 336 F.2d at 388 ("[T]he burden of establishing withdrawal lies on the defendant."); *United States* v. *Cohen*, 145 F.2d 82, 90 (2d Cir. 1944) (defendant "had the burden of satisfying [the jury] that he had withdrawn from the enterprise"), cert. denied, 323 U.S. 799 and 323 U.S. 800 (1945); *Blue* v. *United States*, 138 F.2d 351, 360 (6th Cir. 1943) ("[w]hen once a conspiracy is shown to exist, * * * it continues to exist as to all persons involved until there is shown some affirmative act of withdrawal by persons who attempt to evade responsibility"), cert. denied, 322 U.S. 736 and 322 U.S. 771 (1944); see also Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957-958 (1959) (*Developments in the Law*) (noting that, when a defendant alleged that he withdrew from a conspiracy outside the applicable limitations period, the federal courts had interpreted *Hyde* to "impose[] upon the defendant the burden of persuading the jury of his withdrawal").

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the commencement of the civil suit. *Id.* at 297-298. Relying on *Hyde*, the Court held that, "[i]n the absence of *definite proof* to that effect, abandonment will not be presumed." *Id.* at 298 (emphasis added). Noting that the defendants had presented no evidence to "[]contradict[]" the government's "substantial evidence" that they had "continued" to "participat[e]" in the conspiracy, the Court concluded that the defendants "were *unable to show* that they had abandoned the conspiracy and did not intend further to participate in it." *Ibid.* (emphasis added). The Court's references to "definite proof" and the inability to "show" abandonment suggest that the Court viewed the burden of persuasion as resting with the defendants in that case.

The first court of appeals decision to depart from this practice by explicitly holding that the burden of persuasion on withdrawal ultimately rests with the government was *United States* v. *Read*, 658 F.2d 1225 (7th Cir. 1981), decided 11 years after Congress enacted Sections 846 and 1962(d). The current circuit conflict described in the certiorari-stage pleadings in this case developed only after the decision in *Read*.[9] See *id.* at 1235 (acknowledging that "[p]resent law," as of 1981, placed "the burden of establishing withdrawal * * * on the defendant"); *id.* at 1233 & n.5 (citing earlier decisions of the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits "hold[ing] that the burden is on the defendant to 'prove' or 'establish' withdrawal"); *id.* at 1236 ("overrul[ing]" previous Seventh Circuit decisions that "impos[ed] the burden of proving withdrawal on the defendant"). That relatively recent development obviously cannot inform this Court's analysis of what Congress would have understood to be the background principles against which it was legislating in 1970. Nor would it help petitioner if the division of authority had developed before 1970. As this Court explained in *Dixon*, petitioner would need to show "an overwhelming consensus among federal courts that," in a departure from the common-law rule, "it is the Government's burden to disprove the existence of [the defense of withdrawal] beyond a reasonable doubt." 548 U.S. at 14-15. Instead, "[t]he existence today of disagreement among the Federal Courts of Appeals on this issue, * * * —the very disagreement that caused [the Court] to grant certiorari in this case * * * —demonstrates that no such consensus has ever existed." *Id.* at 15.

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[9] Petitioner overreads (Br. 45-46) the earlier decisions in *Mansfield* v. *United States*, 76 F.2d 224 (8th Cir.), cert. denied, 296 U.S. 601 (1935), and *Buhler* v. *United States*, 33 F.2d 382 (9th Cir. 1929), neither of which held that the government must bear the burden of persuasion on a withdrawal defense. In *Mansfield*, the court rejected the defendants' argument that the district court's withdrawal instruction placed the burden on them "of proving a withdrawal from the conspiracy." 76 F.2d at 229. But in doing so, the court did not opine on the proper allocation of proof burdens, holding that the given instruction did not "relieve the government of the burden of establishing [the defendants'] guilt beyond a reasonable doubt" and that the instruction "was favorable to the [defendants] and cannot be said to have resulted in prejudice." *Id.* at 230. And, although the Ninth Circuit in *Buhler* reversed a conspiracy conviction because the defendant had not "continued to participate in the alleged conspiracy" within the limitations period, it relied heavily on the defendant's own evidence to that effect, did not address which party bore the burden of persuasion, and ultimately concluded that it "ha[d] difficulty in perceiving in what respect [the defendant] *failed to bring himself within*" the defense of withdrawal. 33 F.2d at 385 (emphasis added). That can hardly be construed as an endorsement of petitioner's view of the proper allocation of burdens.

3. Petitioner largely ignores the relevant background principles governing the defense of withdrawal, focusing instead on the law governing statutes of limitations. But the critical question here concerns the withdrawal defense. Congress's provision of a period of limitations, which the government must satisfy with proof when it is placed in issue, see *Grunewald*, 353 U.S. at 396, does not undermine the conclusion that Congress would have intended petitioner to bear the burden of persuasion on the affirmative defense of withdrawal.

As petitioner concedes (Br. 10), the traditional common law did not provide for any limitations-period defenses. Congress has departed from that tradition with respect to most crimes—including the conspiracy crimes with which petitioner was charged. By enacting the free-standing limitations period in 18 U.S.C. 3282(a), Congress required the government to institute a prosecution within the five years after the "offense shall have been committed." As a general matter, if a criminal defendant fails to raise the statute of limitations as a defense, it is waived. See pp. 38-40, *infra*. In a conspiracy prosecution, when the defendant does raise the limitations defense, the government has the burden to show that the individual defendant became a member of the conspiracy and that the conspiracy continued within the applicable limitations period; once the government has presented those facts, it has carried its burden on the limitations issue.[10] See *Grunewald*, 353 U.S. at 396. That is all *Grunewald* requires; as petitioner acknowledges (Pet. Br. 21 n.11), no withdrawal defense was at issue in that case. Nor did the Court in *United States*

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[10] Although the Court in *Grunewald* held that it was "incumbent on the Government to prove that the conspiracy * * * was still in existence" within the limitations period specified by Section 3282, 353 U.S. at 396, the Court did not discuss the scope of the government's burden (*i.e.*, whether proof of the timing must be by a preponderance of the evidence or beyond a reasonable doubt). Very little discussion of that question appears in federal case law. Although several courts of appeals have assumed that the government bears the burden on the limitations issue, see, *e.g.*, *United States* v. *York*, 888 F.2d 1050, 1057 & n.10 (5th Cir. 1989) (noting that government bears beyond-a-reasonable-doubt burden); *United States* v. *Hankin*, 607 F.2d 611, 612 (3d Cir. 1979) (noting that government bears "burden of proof" without specifying what degree of burden), none analyzes the question at any length. At least one court of appeals has held that the government bears the burden of proving by a preponderance of the evidence that a statute of limitations should be tolled when it would otherwise apply. See *United States* v. *Gonsalves*, 675 F.2d 1050, 1053-1054 (9th Cir.), cert. denied, 459 U.S. 837 (1982). In this case, the jury was instructed that the government had to prove beyond a reasonable doubt that the charged conspiracies continued into the limitations period. J.A. 288a-289a, 299a-300a.

*Gypsum Co.* suggest that the government bore the burden on the issue of withdrawal. 438 U.S. at 464-465. Withdrawal differs fundamentally from the underlying limitations issue because it provides an affirmative basis for avoiding liability that a defendant has already been shown to have incurred: *i.e.*, responsibility for the conspiracy that he joined. Thus, when Congress enacted the conspiracy provisions at issue here, it had every reason to expect that the established tradition of placing the burden on the defendant to show withdrawal would continue.

### C. Substantial Practical Considerations Support Placing The Burden On A Conspiracy Defendant To Prove That He Withdrew Before The Limitations Period

The same general principles that undoubtedly informed the historical practice of requiring a defendant to prove withdrawal apply with equal force today and support the conclusion that Congress would have intended petitioner to bear the burden of persuasion on his withdrawal defense.

1. First, the defendant will usually be better situated than the government to adduce evidence on a purported withdrawal defense. As noted, a defense of withdrawal requires that a defendant took "[a]ffirmative acts inconsistent with the object of the conspiracy" such as fully cooperating with authorities or "communicat[ing]" his withdrawal "in a manner reasonably calculated to reach co-conspirators." *United States Gypsum Co.*, 438 U.S. at 464-465. Such a defense will frequently turn on what the defendant told his fellow conspirators, and a defendant will necessarily know better than the government whether or when such communications took place. This Court has recognized that pragmatic factors are rele-

vant in assessing where to place the burden of proving a particular defense. As the Court observed in *Patterson*:

> The placing of the burden of proof on the defense [of acting under extreme mental distress], with a lower threshold * * * is fair because of defendant's knowledge or access to the evidence other than his own [testimony] on the issue. To require the prosecution to negative the 'element' of mitigating circumstances is generally unfair.

432 U.S. at 212 n.13 (quoting with approval *People* v. *Patterson*, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C.J., concurring), aff'd, 432 U.S. 197 (1977)). See *Cooper* v. *Oklahoma*, 517 U.S. 348, 366 (1996) ("[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue."); *Morrison* v. *California*, 291 U.S. 82, 91 (1934) (observing that the burden of proof may properly be placed on the defendant if there exists "a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception").

Because withdrawal depends on a defendant's undertaking "affirmative action" to "disavow or defeat the purpose" of a conspiracy, *Hyde*, 225 U.S. at 369, it would be anomalous to require the government to prove beyond a reasonable doubt that no such action ever occurred. Historically, "the party having in form the affirmative allegation" is the one who pulls the laboring oar—that is, the proponent of a proposition should prove it, rather than the other party having to prove a negative. 9 John H. Wigmore, *Evidence* § 2486, at 288 (1981) (Wigmore) (emphasis omitted); *id.* at 290 (noting that the burden of proving a fact is ordinarily placed on the one "who presumably has peculiar means of knowledge" enabling him to prove it) (emphasis omitted). Additionally, requiring the defendant to prove that he took affirmative steps to withdraw from a conspiracy accords with the "frequently significant consideration" of assigning the burden of proof based on "the judicial estimate of the probabilities of the situation." *McCormick* § 337, at 413; see *ibid.* ("The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred.").

Second, in most cases in which a defendant raises a claim of withdrawal, the government will be unable to call the witnesses most likely to have information bearing on the point, *i.e.*, the defendant and his co-conspirators. Because evidence tending to establish withdrawal from a conspiracy also tends to confirm the existence and membership of a conspiracy to begin with, see *United States* v. *Hamilton*, 538 F.3d 162, 174 (2d Cir. 2008), the most likely witnesses generally can be expected to assert their Fifth Amendment rights against compelled self-incrimination. Petitioner's proposed rule—that a defendant need introduce only enough evidence to present a *prima facie* case of withdrawal—could affirmatively undermine the government's ability to rebut such evidence. The Federal Rules of Evidence generally permit the introduction of out-of-court statements made by a defendant's "coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). But a defendant may rely on a defense of "withdrawal as a means of limiting the admissibility against him of the subsequent acts and declarations of the other conspirators." Wayne R. LaFave, *Criminal Law* § 12.4(a), at 687 (5th ed. 2010) (LaFave); see also *United States* v. *Patel*, 879 F.2d 292, 293 (7th Cir. 1989) (Posner, J.), cert. denied, 494 U.S. 1016 (1990). If a defendant could defeat Rule 801(d)(2)(E)'s exception to the hearsay rule merely by asserting a defense of withdrawal, rather than by having to prove withdrawal by a preponderance of the evidence, the government could well be hamstrung in its ability to rebut the defendant's assertion.

Third, while a conspiracy defendant will presumably know whether he will raise a withdrawal defense, he is generally under no obligation to notify the government before trial that he intends to do so. 1A Charles A. Wright & Andrew D. Liepold, *Federal Practice and Procedure* § 193, at 433 & n.66 (4th ed. 2008) (defendant may raise a limitations defense for the first time "at trial") (citing cases); see *United States* v. *Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994) (same, where the question of whether the prosecution was "time barred" was "bound up with evidence about the alleged offense itself"), cert. denied, 514 U.S. 1051 (1995). Often, then, the government will have little or no opportunity to investigate the claim and to identify and locate witnesses capable of rebutting such a defense, let alone disproving it beyond a reasonable doubt.

Fourth, requiring the defendant to establish the defense of withdrawal helps protect against spurious claims of withdrawal. The defendant and his co-conspirators are the likeliest source of evidence in support of withdrawal, they have the most to gain from offering false testimony in support of it, and, as this very case reflects, they will often seek to protect one another even after they are apprehended and even at the expense of some of their interests. See, *e.g.*, J.A. 185a, 192a, 199a-200a, 262a-264a, 266a-268a (petitioner agreed to plead guilty to a shooting so that co-conspirator Gray would be charged with only a misdemeanor in connection with the shooting, and Gray in return rewarded petitioner by giving him marijuana and money while he was in prison). At the same time, because withdrawal will often turn heavily or even exclusively on what the defendant "[a]ffirmative[ly] * * * communicated" to his co-conspirators, in secret, about his continued involvement, *United States Gypsum Co.*, 438 U.S. at 464-465, the government can be expected to have a difficult time rebutting (beyond a reasonable doubt) even the most questionable *prima facie* case of withdrawal. See R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy*, 64 Fla. L. Rev. 353, 375-376 (2012) ("The secrecy with which conspiracies are conducted and the absence of formality with which they are executed makes it very difficult to prove when an agreement has ceased. * * * The government may be particularly ill-equipped to rebut fabricated claims of withdrawal when the theory of withdrawal advanced by the defendant involves notice to coconspirators rather than notice to authorities."). Indeed, the "clear purpose[]" of the withdrawal defense is "to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered." *Developments in the Law* 957. The allocation of the burden of persuasion should further that goal. But given the difficulty of proving a lack of withdrawal beyond a reasonable doubt, placing the burden on the government would undermine defendants' incentive to withdraw.

Given those realities, requiring the government to prove beyond a reasonable doubt that a defendant did *not* withdraw—within a particular time-frame from a conspiracy that the government has already proved beyond a reasonable doubt he willingly joined—would overprotect defendants while jeopardizing important interests in punishing those who violate the law. "The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is * * * an increased risk that the guilty will go free." *Patterson*, 432 U.S. at 208. Although "our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits." *Ibid.* In the context of withdrawal—where the defendant has engaged in a conspiracy with the requisite mental state, is presumed to continue in that conspiracy, and yet seeks to be excused from the violation because the prosecution is purportedly brought too late—society should not have to bear the risk that the government may be unable to negate the excuse. Rather, it is appropriate to place on a defendant the comparatively light burden of proving by a preponderance of the evidence that he is entitled to be excused from liability.

2. Petitioner does not directly address the foregoing practical problems. Instead, petitioner leans heavily on the proposition that "statutes of limitations must 'be liberally interpreted in favor of repose.'" Br. 13 (quoting *Bridges* v. *United States*, 346 U.S. 209, 216 (1953)); see Br. 9-19, 50-52. Although that is undoubtedly an established principle of federal law, it has no application in this case, which does not involve an interpretation of the applicable statute of limitations. There is no dispute that Section 3282(a) requires the government to prove that the charged conspiracies took place within the five years preceding the indictment. See *Grunewald* v. *United States*, *supra*. Nor does this case involve any

question of tolling. The disputed question pertains to the affirmative defense of withdrawal once the government has shown a conspiracy within the limitations period. And this Court instructed in *Dixon* that courts should "effectuate [an] affirmative defense," including by allocating burdens of persuasion, "as Congress 'may have contemplated' it *in an offense-specific context.*" 548 U.S. at 17 (quoting *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 491 n.3) (emphasis added).

It is true, as petitioner's amicus points out (NACDL Amicus Br. 12-13), that a conspiracy defendant is liable for a broad range of conduct related to the charged conspiracy—once the government proves that he intentionally joined the conspiracy and that the conspiracy continued within the limitations period. But that imposition of liability for the substantive results of a conspiracy one has joined reflects the long-recognized reality that the conspirators "act for each other in carrying [the agreement] forward." *Pinkerton*, 328 U.S. at 646. The dangers of conspiracy warrant holding each conspirator liable for his confederates' crimes in furtherance of the illegal agreement. As this Court explained in *Iannelli* v. *United States*:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.

420 U.S. 770, 778 (1975); see also *United States* v. *Jimenez Recio*, 537 U.S. 270, 275 (2003) ("[A] conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—

both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'") (quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961) (second and third alterations in original)).

Indeed, this Court considered the interplay between the withdrawal and statute-of-limitations defenses in *Hyde*, rejecting the contention that treating a conspiracy as a "continuous" offense "take[s] the defense of the statute of limitations [away] from conspiracies" and unduly undermines a defendant's interest in repose. 225 U.S. at 369. The Court concluded that there is "certainly * * * no hardship" in "requr[ing]" a defendant to undertake "affirmative action" to withdraw from a conspiracy, and it emphasized that a defendant "is in no situation to claim the delay of the law" until he does so. *Ibid.* The same is true of requiring a defendant to prove by a preponderance of the evidence that he in fact took the required affirmative action to effectuate a withdrawal outside the limitations period.

### D. Placing The Burden On The Defendant To Establish Withdrawal By A Preponderance Of The Evidence Does Not Violate The Due Process Clause

Petitioner contends (Br. 23-24, 31-41) that the Due Process Clause forbids Congress from placing on a defendant the burden of proving the defense that he withdrew from a conspiracy before the limitations period by a preponderance of the evidence. But the due process rule on which petitioner relies applies to offense elements—not to defenses provided as a matter of policy. Particularly with respect to a showing that operates as an affirmative defense (withdrawal) *within* an affirmative defense (the statute of limitations), the Due Process Clause does not place any burden of persuasion on the government.

1. In a series of cases, this Court has made clear that a legislature may place the burden of persuasion on a criminal defendant to establish an affirmative defense without violating the Due Process Clauses of the Fifth or Fourteenth Amendments. In *Leland* v. *Oregon*, 343 U.S. 790, 792-793 (1952), the Court rejected a murder defendant's due process challenge to a state statutory requirement that he establish the defense of insanity beyond a reasonable doubt. In upholding Oregon's allocation of burdens, the Court clarified that its previous decision in *Davis* v. *United States*, 160 U.S. 469 (1895)—which had required the government to disprove the defense of insanity beyond a reasonable doubt—was not a constitutional ruling and was not consistent with the background common-law rule. *Leland*, 343 U.S. at 797.

After the Court's subsequent decision in *In re Winship*, 397 U.S. at 364, which held that due process requires the government to prove beyond a reasonable doubt every fact necessary to establish that a defendant committed the charged crime, the Court reaffirmed the validity of the rule articulated in *Leland*. See *Patterson*, 432 U.S. at 205 (rejecting claim that "*Leland* had been overruled by *Winship*"). In *Patterson*, the Court considered a due process challenge to a state statutory scheme that defined second-degree murder as the intentional killing of another person and allowed a defendant to reduce his crime to manslaughter by proving the affirmative defense of extreme emotional disturbance. 432 U.S. at 198, 206-207. Taking note of the historical context, the Court explained that the statutory defense at issue "is a considerably expanded version of the common-law defense of heat of passion on sudden provocation," a defense as to which a defendant bore the burden at common law. *Id.* at 202. The Court also noted that:

> Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant.

*Id.* at 211.

The particular statutory scheme at issue in *Patterson*, the Court explained, was comparable to that upheld in *Leland*, whereby "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence." 432 U.S. at 206. Such a scheme, the Court held, does not violate the Due Process Clause because the affirmative defense of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder," but rather "constitutes a separate issue on which the defendant is required to carry the burden of persuasion." *Id.* at 206-207. The Court thus declined to "adopt as a constitutional imperative" a requirement that a State "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.* at 210; see *ibid.* ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required.").

The Court again reaffirmed the holdings of *Leland* and *Patterson* in *Martin* and *Dixon*. In *Martin*, the

Court rejected a due process challenge to a State's placing the burden of proving self-defense on a defendant charged with aggravated murder, a charge that required proof that she acted with prior calculation and design. 480 U.S. at 230-231, 236. The Court was "not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former." *Id.* at 234. Although evidence adduced by the defendant tending to show that she was acting in self-defense might create a reasonable doubt in jurors' minds about whether she acted with the requisite prior calculation and design, the Court explained, requiring the defendant to bear the risk of nonpersuasion as to self-defense did "not shift to the defendant the burden of disproving any element of the state's case." *Ibid.* The State was still required to prove beyond a reasonable doubt that the defendant acted with prior design and calculation in order to secure a conviction for aggravated murder. *Ibid.*; see *Gilmore* v. *Taylor*, 508 U.S. 333, 341 (1993) ("States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but * * * they may place on defendants the burden of proving affirmative defenses."). In *Dixon*, the Court again relied on *Martin* and *Patterson* in rejecting a due process challenge to requiring a defendant to bear the burden of persuasion as to the "affirmative defense" of duress in a firearms offense prosecution under 18 U.S.C. 922(a)(6) and (n). 548 U.S. at 8-17. The Court explained that the duress defense "may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." *Id.* at 6.

2. Petitioner's due process claim rests entirely on the inaccurate premise that "one of the elements the government was required to prove" under 21 U.S.C. 846 and 18 U.S.C. 1962(d) was petitioner's personal (or "individual") overt "participation" "within the statutory period." Br. 9, 21 n.11, 27; see Br. 40 ("The jury here was never advised of the Government's burden to prove beyond a reasonable doubt that [p]etitioner himself participated in the charged conspiracy within the limitations period."); see also, *e.g.*, Br. 22-23, 31-34, 37, 40-41. Petitioner argues that, because such active "participation" within the limitations period is an "element" of the charged conspiracy offenses and because "[p]articipation and withdrawal are two inconsistent things," proof of withdrawal would "negate" the required proof of participation. Br. 34; see Br. 8-9, 26, 30, 50; see NACDL Amicus Br. 8-10. Petitioner is incorrect.

a. Statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." *Toussie*, 397 U.S. at 114. Such statutes "may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.* at 115. And they provide a form of "amnesty" after the elapse of a sufficient interval of time. *Stogner* v. *California*, 539 U.S. 607, 611 (2003) (quoting Fracis Wharton, *Criminal Pleading and Practice* § 316, at 210 (8th ed. 1880)).

For policy reasons, then, a limitations defense permits a defendant to escape liability for certain categories of criminal conduct that would have been punishable if the government had initiated the prosecution sooner. A successful limitations defense renders the defendant's conduct nonprosecutable, not noncriminal. Such a defense is "nonexculpatory" and is "not at all grounded in a lack of culpability of the defendant." 2 LaFave § 9.1(a), at 473; see *United States* v. *Scott*, 437 U.S. 82, 111 (1978) (Brennan, J., dissenting) (observing that a limitations defense "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts"). Like the defense of duress in *Dixon*, a limitations defense at most "excuse[s]" "conduct which violates the literal language of the criminal law." *Dixon*, 548 U.S. at 7 n.5.

b. In part because a limitations defense is a nonexculpatory exemption from prosecution, the government is not required to prove that it satisfied the limitations requirement as an element of the conspiracy offense (or any other offense). A limitations defense also cannot be thought to negate an element of the crime of conspiracy. Federal practice for at least the past 140 years illustrates the point by making clear that the government need not have alleged facts bearing on the limitations period in the indictment. In *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872), this Court concluded that a defendant could not raise a limitations defense solely by means of a "demurrer"—*i.e.*, by admitting to the indictment's factual allegations and then seeking outright dismissal based on the allegedly expired limitations period. The Court explained that the government was not required to plead in an embezzlement indictment that the defendant committed the offense within the limitations period. *Id.* at 179. Rather, the question of timing of the alleged illegal activity was one for the defendant to "give * * * in evidence" at trial, because "*time [was] not of the essence of the offence*" of embezzling. *Id.* at 179-180 (emphasis added). Significantly, the Court relied on the fact that the limitations exemption was contained in a proviso rather than incorporated in the statutory clause defining the criminal offense. *Id.* at 177. In such a statutory scheme, the Court held, "it is not necessary for the plaintiff in suing for the penalty to negative such proviso." *Ibid.* (quoting *Steel* v. *Smith*, 106 Eng. Rep. 35, 37 (1817)). Instead, "it is for the party for whom matter of excuse is furnished * * * to bring it forward in his defence." *Id.* at 176. Here, the limitations requirement is found in an entirely separate statute.

The reasoning of *Cook* strongly undermines petitioner's primary assertion that a defendant's personal, active "participation" "within the statutory period" is "one of the elements" of conspiracy "the government [is] required to prove." Pet. Br. 9; see, *e.g.*, Br. 22-23, 31-34, 37, 40-41. If personal and overt participation within the limitations period were an element of conspiracy, one would expect to find either mention of such an element in the text of the conspiracy statutes or a long tradition of cases holding that the government must allege the issue of timing in the indictment. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."). But petitioner cites no such cases—at least none predating *Read*—and analogous cases, like *Cook*, have indicated the contrary.

For example, this Court reaffirmed in *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917), that "[t]he statute of limitations is a defense" that "must be asserted on the trial by the defendant in criminal cases." Similarly, in *United States* v. *Sisson*, 399 U.S. 267, 288 (1970), the Court stressed that "[i]t has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." Accord *United*

*States* v. *Titterington*, 374 F.3d 453, 456-457 (6th Cir. 2004) (Sutton, J.) (relying on *Cook* and *Sisson* to hold that the government did not have to allege in the indictment that the defendant's fraud, RICO, and smuggling offenses occurred within the limitations period, because time is "not an essential element" of those offenses), cert. denied, 543 U.S. 1153 (2005). And the courts of appeals have consistently held that "[t]he statute of limitations is an affirmative defense which a criminal defendant has the responsibility of raising and preserving before or at trial if he seeks its benefit." *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012); see *id.* at 12-13 n.18 (surveying case law, and noting that some courts of appeals treat a defendant's failure to raise the defense as a waiver while others treat it as a forfeiture); see also, *e.g.*, *United States* v. *Najjar*, 283 F.3d 1306, 1308 (11th Cir.) (waiver), cert. denied, 537 U.S. 823 (2002); *United States* v. *LeMaux*, 994 F.2d 684, 689-690 (9th Cir. 1993) (same); *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (same), cert. denied, 503 U.S. 908 (1992); *United States* v. *Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) (same); *United States* v. *Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986) (same), cert. denied, 480 U.S. 907 (1987); *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir.) (same), cert. denied, 464 U.S. 825 (1983); *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982) (same), cert. denied, 459 U.S. 1110 (1983).

If the statute of limitations had the character of an "element," the defendant could not waive it by failing to raise it, and the government would be required to prove it (and to secure a jury instruction on it) in every case. See, *e.g.*, *United States* v. *Higdon*, 638 F.3d 233, 241-243 (3d Cir. 2011) (holding that a defendant may not remove an element of an offense from the jury's consideration by stipulating to it); see also *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (holding that the government is required to prove every element of an offense even if the defendant does not contest a particular element); *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988) (a defendant's plea of not guilty "puts the prosecution to its proof as to all elements of the crime charged"). Petitioner makes no contention that that is the case, and settled federal practice is to the contrary.[11]

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[11] State cases confirm that no settled tradition exists on the treatment of statutes of limitations as "elements." See, *e.g.*, *State* v. *Ward*, No. 18898, 2012 WL 4094274, at *4 (Conn. Sept. 18, 2012) ("Statutes of limitation are generally considered an affirmative defense which must be proved by the defendant by a preponderance of the evidence.") (internal quotation marks omitted); *Proctor* v. *State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) (en banc) (holding that a defendant forfeits a limitations defense by failing to raise it, but that the government bears the burden of proving beyond a reasonable doubt that the limitations period has been satisfied once the defendant raises the issue); *People* v. *Eitzen*, 117 Cal. Rptr. 772, 780 (Cal. Ct. App. 1974) (noting that limitations issue is jurisdictional, not an affirmative defense); see also Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1199 n.207 (1950) (noting division of authority among state courts). That strongly supports the conclusion that due process does not require treating the limitations period as an element. See *Patterson*, 432 U.S. at 201-202 (due process not violated unless a state procedure, "including [allocating] the burden of producing evidence and the burden of persuasion, * * * offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (internal quotation marks omitted); see also *Medina* v. *California*, 505 U.S. 437, 445-446 (1992) (finding "no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence," and therefore rejecting due process claim under the *Patterson* test)

Petitioner misreads *Cook*, taking out of context the Court's statement that "the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed." Br. 19-20 (quoting *Cook*, 84 U.S. (17 Wall.) at 180) (emphasis omitted). Although it is true that the limitations period in Section 3282(a) requires the government to prove that the charged conspiracy "was committed within [five] years next before the indictment was found and filed," *Cook*, 84 U.S. (17 Wall.) at 180, it does not follow that the government bears the burden of establishing beyond a reasonable doubt that petitioner committed an affirmative act of membership in that time. As discussed, the government satisfied its burden under Section 3282(a) when it proved beyond a reasonable doubt that the conspiracy "was still in existence" during the limitations period. *Grunewald*, 353 U.S. at 396;[12] see J.A. 288a-289a, 299a-300a (jury instructions).

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[12] When the Court in *Grunewald* allocated to the government the burden to prove satisfaction of a limitations requirement (when a defendant raises the issue), it was not because the limitations requirement is an element of the crime of conspiracy; it is not. See pp. 36-37, *supra*, pp. 42-45, *infra*. Nor do the general federal limitations provisions allocate a burden of proof. See, *e.g.*, Rev. Stat. §§ 1043-1048 (1875). To the extent that the *Grunewald* Court considered the allocation of the burden of proof to be "merely a question of policy and fairness based on experience in the different situations," Wigmore § 2486, at 291, allocating to the government the burden of persuasion on a limitations question may reflect a judgment that, because the government is already required to prove beyond a reasonable doubt that the charged crime occurred, it is generally fair to require the government to prove *when* the crime happened if the defendant puts that at issue.

It is not the case that an individual defendant's active "participation" "within the statutory period" is "one of the elements" of conspiracy "the government [is] required to prove." Pet. Br. 9. Petitioner's reliance (Br. 20) on *United States* v. *Barber*, 219 U.S. 72 (1911), and *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), in support of that contention is misplaced. Those cases noted that the question whether the government complied with a statute of limitations went to the "merits" of the charges at issue. But the same can be said of any affirmative defense—if a defendant establishes that he is entitled to such a defense, he cannot be convicted and will prevail on the merits of the underlying charge. This Court has made clear, however, that the government need not bear the burden of persuasion on an affirmative defense merely because it may preclude the imposition of liability. See pp. 18-20, 32-36, *supra.*

If petitioner's view—that the government must establish an individual's overt participation in the conspiracy within the limitations period—were correct, the government would need to prove in every case involving a conspiracy that was formed outside the relevant limitations period that every charged conspirator took an affirmative act to reaffirm his membership within the limitations period. That implication is particularly incongruous for conspiracy statutes like Section 841 and RICO, which do not require *any* proof of an overt act to establish the elements of the offense. See p. 14, *supra.* It is equally incongruous for overt-act conspiracy offenses, like 18 U.S.C. 371, that do not require that a particular defendant have performed the overt act; "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Pinkerton*, 328 U.S. at 646-647; see *Salinas*, 522 U.S. at

63-64 (allegation that particular defendant committed an overt act is unnecessary; "so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators") (citing *Bannon* v. *United States*, 156 U.S. 464 (1895)). Notably, although that is certainly the logical conclusion of petitioner's position, even he does not make that assertion. Such an argument would, in any event, be directly at odds with this Court's holding in *Hyde* that the defendant in that case remained part of a conspiracy even though, as his jury was charged, he "did not do anything within the [limitations] period, but remained acquiescent." 225 U.S. at 368 (internal quotation marks omitted). Because of the "continuous" nature of the crime of conspiracy, the Court explained, the acts of a defendant's co-conspirators are attributable to him for statute-of-limitations purposes, absent some "affirmative" withdrawal on his part. *Id.* at 368-369; see *Pinkerton*, 328 U.S. at 646; *Kissel*, 218 U.S. at 608; see also J.A. 126a ("[O]nce the government proves that a defendant was a member of an ongoing conspiracy, it has proven the defendant's continuous membership in that conspiracy unless and until the defendant withdraws.").

c. Because the timing of a defendant's actions demonstrating membership in a conspiracy is not an element of the conspiracy offense, petitioner cannot be correct in asserting that due process requires the government to negate a withdrawal defense beyond a reasonable doubt. Withdrawal functions as an affirmative defense to the government's showing that it brought criminal charges within the time allowed by the limitations period. The claim that a defendant withdrew from a conspiracy at an earlier point does not negate the government's showing; it simply takes advantage of a bar to the imposition of liability that is available as a matter of policy. The Court has made clear in the *Winship* line of cases that due process requires the government to prove only the elements of the offense as defined by the legislature and interpreted by the courts. See, *e.g.*, *Martin*, 480 U.S. at 231-232, 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982). As the Court observed in *Patterson*, "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a [legislature] defines the offense that is charged in any given case." 432 U.S. at 211 n.12; see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); *Dixon*, 548 U.S. at 7; *id.* at 21, 29 (Breyer, J., dissenting).[13] Here, those elements include proof of knowing and intentional membership (at some point) in the conspiracy and proof that the conspiracy writ large existed within five years—not proof that petitioner reaffirmed his membership through words or deeds within that five-year period. Accordingly, the government bears no burden of proof on the issue of withdrawal. Petitioner's amicus is incorrect in asserting that "[n]ot even the Government can dispute that the defense

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[13] Nothing in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or the cases following in its wake (many of which predated *Dixon*) alters the analysis this Court has employed in allocating burdens of persuasion as to affirmative defenses. In *Apprendi*, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. That holding "leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt * * * the legislation creating the offense can place the burden of proving affirmative defenses on the defendant." *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.) (citations omitted), cert. denied, 537 U.S. 829 (2002); see *Apprendi*, 530 U.S. at 485 n.12 (discussing *Patterson*); *Jones* v. *United States*, 526 U.S. 227, 241 (1999) (same).

* * * [of] withdrawal from a conspiracy prior to the statute of limitations period[] directly negates the 'knowingly participated' element of the two conspiracy offenses * * * with which [petitioner] was charged." NACDL Amicus Br. 9. On the contrary, the withdrawal defense tends to confirm, rather than refute, that a conspiracy defendant knowingly participated in the charged conspiracy, for a defendant would have nothing from which to withdraw if he had not joined the conspiracy in the first place.

d. Finally, the Court did note in *Patterson* that the Due Process Clause might prevent a legislature from requiring a defendant to bear the burden on a particular affirmative defense when doing so would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 202 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). This is not such a case. The Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion); see *Medina* v. *California*, 505 U.S. 437, 446 (1992). And given the longstanding common-law rule that a defendant bore the risk of nonpersuasion on affirmative defenses, see *Dixon*, 548 U.S. at 8, 17, it cannot be that requiring petitioner to prove a separate issue that does not negate an element of the offense and as to which he has superior knowledge runs afoul of the people's deeply rooted traditions and conscience.

### E. Even If Petitioner Were Correct That The Government Bears The Burden Of Persuasion On The Issue Of Withdrawal, He Would Not Be Entitled To An Outright Reversal Of His Conviction

Petitioner argues (Br. 52-53) that, if the government does bear the burden of persuasion on his claimed defense of withdrawal, the district court's contrary instruction to the jury was "structural error" requiring automatic reversal. But petitioner did not raise the issue of structural error in his petition for a writ of certiorari or in his reply brief in support thereof. On the contrary, he argued in his reply that the "harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), will apply" if this Court endorses his argument that the government bears the burden of persuasion. Reply Br. in Supp. of Cert. 4 n.2.

In any event, petitioner's claim of structural error is without merit. In *Rose* v. *Clark*, 478 U.S. 570 (1986), this Court applied harmless-error review to a jury instruction that erroneously shifted the burden of proof to the defendant on the element of malice in a state prosecution for first-degree murder. *Id.* at 579-582. That type of error, the Court reasoned, "is not 'so basic to a fair trial' that it can never be harmless." *Id.* at 580 (quoting *Chapman*, 386 U.S. at 23). And in *Neder* v. *United States*, 527 U.S. 1 (1999), the Court applied harmless-error review where the jury instructions omitted an element of the charged offense altogether. *Id.* at 8-15; see also *Carella* v. *California*, 491 U.S. 263, 266-267 (1989) (per curiam) (applying harmless-error review when jury was erroneously instructed that it must presume an element of the charged offense from the establishment of certain predicate facts). Petitioner relies (Br. 52) on *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), in which the

Court declined to apply harmless-error review when a jury received a defective reasonable-doubt instruction that applied to all of its findings. But this Court has already declined to extend *Sullivan* in the manner petitioner proposes, explaining in *Neder* that the failure to properly instruct a jury on one element of an offense (as was the case in *Neder* and as petitioner argues was the case here) does not call into question the validity of the jury's verdict generally. 527 U.S. at 11-13; *id.* at 11 ("By contrast [to *Sullivan*], the jury-instruction error here did not 'vitiat[e] *all* the jury's findings.'") (second brackets in original) (quoting *Sullivan*, 508 U.S. at 281). Accordingly, if the Court concludes that the withdrawal instruction here was erroneous, it should remand to the court of appeals to consider in the first instance whether the error was harmless. Cf. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934-2935 & n.46 (2010). That approach would be especially appropriate because petitioner acquiesced to it in his certiorari-stage pleadings. See Reply Br. in Supp. of Cert. 4-5 & n.1 (because "the issue of harmlessness * * * is not * * * clear cut," the court of appeals "should have the opportunity in the first instance to apply the correct rule to the facts of this case").

The record, moreover, contains ample evidence to rebut any *prima facie* showing of withdrawal. Although petitioner does not identify in his brief what evidence he would rely on to satisfy his burden of production as to withdrawal, in the court of appeals he relied on the fact of his incarceration beginning in 1994 and on the testimony of a government witness that petitioner told the witness he refused in 1997 to comply with a 1997 directive from Gray (a leader of the conspiracy) to kill that witness. Pet. C.A. Br. 294-296. But "[n]either authority

nor reason would suggest that imprisonment necessarily shows a withdrawal." *Borelli*, 336 F.2d at 389; see also, *e.g.*, *United States* v. *Fishman*, 645 F.3d 1175, 1196 (10th Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012); *United States* v. *Mangual-Santiago*, 562 F.3d 411, 422-423 (1st Cir.), cert. denied, 130 S. Ct. 293 (2009); *United States* v. *Diaz*, 176 F.3d 52, 98 (2d Cir.), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999); *United States* v. *Gonzalez,* 940 F.2d 1413, 1427 (11th Cir. 1991), cert. denied, 502 U.S. 1047 and 502 U.S. 1103 (1992). At most, petitioner's imprisonment, standing alone, might have demonstrated a cessation of activity—which is not sufficient to establish the type of affirmative action necessary to demonstrate withdrawal, let alone that petitioner effectively communicated his intent to withdraw to his co-conspirators.

A review of the evidence presented at trial in fact reveals that petitioner continued to be an active member of the conspiracy while incarcerated. The evidence established that petitioner pleaded guilty to the felony offense that sent him to prison in order to allow Gray to plead guilty to a misdemeanor offense. J.A. 184a, 192a. Gray, in turn, rewarded petitioner by supplying him with marijuana while in prison and by sending money to petitioner and his wife. J.A. 185a, 199a-200a, 262a-268a. In addition, petitioner looked out for the interests of the conspiracy while he was in prison by providing information to Gray about a suspected cooperator and by threatening a cooperating witness. J.A. 254a-260a, 207a-248a. Far from establishing that petitioner took some affirmative step to withdraw from the conspiracy, the evidence thus shows that he continued his association with Gray and other members of the conspiracy within the limitations period while he was in prison. Nor does petitioner's alleged refusal to commit one murder, see

J.A. 187a-190a, establish that he committed acts that were inconsistent with the goals of the narcotics and RICO conspiracies or that he "communicated" his withdrawal "in a manner reasonably calculated to reach co-conspirators," *United States Gypsum Co.*, 438 U.S. at 464-465. Indeed, that alleged incident occurred in 1997 (within the limitations period) and could easily be viewed as evidence that petitioner remained part of the conspiracy when the conspiracy's leader asked him to commit the murder—or at the very least that he had not communicated any withdrawal to his co-conspirators.

* * * * *

The record evidence of petitioner's non-withdrawal only underscores the appropriateness of placing the burden of persuasion on the defendant. If evidence exists that shows withdrawal, it is uniquely in the hands of petitioner, who did not produce it. It would risk serious unfairness to allow petitioner to escape liability for a conspiracy he willingly joined only because the government could not provide proof based on facts only known to petitioner and his co-conspirators. The court of appeals' sensible rule that petitioner should shoulder that burden is consistent with tradition and common sense. And it should be affirmed.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
LANNY A. BREUER
*Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
SARAH E. HARRINGTON
*Assistant to the Solicitor General*
STEPHAN E. OESTREICHER, JR.
*Attorney*

OCTOBER 2012

# APPENDIX

1. 18 U.S.C. 1962 provides in pertinent part:

**Prohibited activities**

* * * * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

2. 18 U.S.C. 3282 provides in pertinent part:

**Offenses not capital**

(a) In General—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

3. 21 U.S.C. 841 provides in pertinent part:

**Prohibited acts A**

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

4. 21 U.S.C. 846 provides:

**Attempt and conspiracy**

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

# REPLY BRIEF

No. 11-8976

IN THE
# Supreme Court of the United States

CALVIN SMITH AND JOHN RAYNOR,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

# REPLY BRIEF FOR PETITIONERS

**A.J. KRAMER**
**FEDERAL PUBLIC DEFENDER**
*Counsel of Record*
**ROSANNA M. TAORMINA**
**ASSISTANT FEDERAL PUBLIC DEFENDER**
625 Indiana Ave., N.W.
Suite 550
Washington, DC 20004
(202) 208-7500
A._J._Kramer@fd.org

*Counsel for Petitioner Calvin Smith*

244449

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## INTRODUCTION

The Government does not dispute that a defendant must have committed a criminal offense within the limitations period in order for him to be prosecuted; nor does it dispute that the prosecution has the burden to prove that the offense was committed within the statutory period. In light of these concessions—and under a proper understanding of this Court's precedents—the district court's instruction was error.

The Government misunderstands the issue in the present case, claiming that "[w]ithdrawal differs fundamentally from the underlying limitations issue." (Gov't Br. 25.) It states that the "critical question here concerns the withdrawal defense," and faults Petitioner for "focusing" on the statute of limitations. (Gov't Br. 23.) But the Government has it backwards: It is the statute of limitations that bars a prosecution when a defendant withdraws from a conspiracy. In *Hyde v. United States*, 225 U.S. 347, 369 (1912), the Court held that "affirmative action" is required to withdraw from a conspiracy, but stated that this did not "take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different." *Id.*; *see also United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981) ("[W]ithdrawal becomes a complete defense . . . when coupled with the defense of the statute of limitations."). Thus, contrary to the Government's position, the statute of limitations is the critical issue—withdrawal simply starts the clock.

## ARGUMENT

### I. THE GOVERNMENT HAS THE BURDEN TO PROVE THE MEMBERSHIP ELEMENT OF A CONSPIRACY OFFENSE WITHIN THE LIMITATIONS PERIOD.

The Government acknowledges that in order to meet its burden to prove beyond a reasonable doubt that Petitioner committed the crime of conspiracy within the limitations period, it had to prove that the "charged conspiracies" extended to within the limitations period (*see* Gov't Br. 9, 30), but contends that it did not have to prove Petitioner's *membership* in the conspiracies within that period (*see* Gov't Br. 24, 41). Because *Petitioner* could not have committed the crime of conspiracy during the statutory period unless *he* was a member of a conspiracy during that period, the Government's position is incorrect.

As discussed in Petitioner's opening brief, the existence of "a conspiracy" is merely one element of the *crime* of conspiracy. An individual does not become liable for that crime (or the substantive crimes that result) unless and until he becomes a member of an unlawful agreement. This is why membership—or knowing and willful participation, as the district court characterized it to the jury in this case (J.A. 290a)—is a necessary element of any conspiracy offense. Without that element, there would be no connection between "the conspiracy" and the individual defendant.

While "a conspiracy" can and will continue for as long as at least two people agree to further its objectives, an individual can withdraw from the conspiracy by taking affirmative action to "defeat or disavow" its objectives. *Hyde*, 225 U.S. at 369. At that point, he is no longer a member of the criminal agreement. Even if "the conspiracy" continues, the crime of conspiracy is complete as to that individual. This is precisely why this Court has recognized that the statute of limitations begins to run upon an individual defendant's withdrawal. *Id.*

The Government concedes—as it must—that "an individual member of a conspiracy may commence the running of a limitations period as to him, even when the relevant conspiracy continues to exist[], by withdrawing from the conspiracy." (Gov't Br. 9-10.) Thus, by the Government's own admission, a continuing "conspiracy" does not serve to extend the liability of an individual who has withdrawn from the enterprise. The Government's insistence that it had the burden to prove the existence of the alleged conspiracies within the limitations period, but not Petitioner's membership during that period, is impossible to square with this admission.

The only authority the Government provides for its position in this regard is a citation to the Court's decision in *Grunewald v. United States*, 353 U.S. 391, 396 (1957). (*See* Gov't Br. 24, 41.) But *Grunewald* supports Petitioner by addressing the parallel question of what showing is required when multiple defendants present evidence that "the conspiracy" itself concluded outside the limitations period. In *Grunewald*, the defendants had been convicted of violating 18 U.S.C. § 371, an overt act conspiracy statute. 353 U.S. at 393. The government had alleged that the defendants' conspiracy included an agreement to conceal the acts of the conspirators once their underlying goal was accomplished. *Id.* at 394. On appeal, none of the defendants claimed to have withdrawn from the conspiracy before its termination; they argued instead that there was no agreement to conceal and that, because the criminal object of their conspiracy had been attained over three years before their indictment, their prosecutions were barred by the (then three-year) statute of limitations. *Id.* at 397. Accordingly, the "crucial question" before the Court was "the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy[] and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Id.* In contrast to this case, in which the issue is the continuation of membership within the limitations period, the issue in *Grunewald* was continuation of the conspiracy itself. Because the question on appeal was not individual withdrawal, the element of membership was not at issue.

The Court began its analysis by recognizing that in order to sustain the defendants' convictions, "[i]t was . . . incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence [during the limitations period] and that at least one overt act in furtherance of the conspiracy was performed [within that period]." *Id.* at 396. Thus, in a case where the defendants argued that their conspiracy terminated outside the statutory period, the Court made clear that it was the Government's burden to prove that the conspiracy continued to within the statutory period—i.e., the Government was required to disprove the defendants' termination defense. Here, Petitioner argues that his membership terminated outside the statutory period. The logical extension of *Grunewald* therefore required the Government to bear the burden of proving Petitioner's membership within the statutory period—i.e., the Government was required to disprove Petitioner's withdrawal defense.[1]

Nevertheless, it is the above "incumbent on the Government" language upon which the Government relies in contending that it did *not* have the burden to prove that Petitioner was a member of the alleged conspiracies during the statutory period.[2] The Government apparently contends that, because the Court did not mention the element of membership—in a case where the membership element was not an issue on appeal—it necessarily follows that it is *not* "incumbent on the Government" to prove that element within the statutory period. Other than its citation to *Grunewald*, the Government offers no explanation for why this should be the legal rule.

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[1] The Government appears to argue—though it is not clear—that it need only prove membership outside the limitations period *because* membership is presumed to continue until withdrawal. But just as membership is presumed to continue until withdrawal, "a conspiracy" is presumed to continue until success or termination. *United States v. Kissel*, 218 U.S. 601, 608 (1910). Thus, if the presumption of continuity functioned to alter the Government's burden as the Government suggests, the Court in *Grunewald* would have concluded that it was incumbent on the Government to prove the existence of "the conspiracy" beyond a reasonable doubt, at which point, the burden would shift to the defendants to prove termination outside the limitations period. It stated instead that it was the Government's burden to prove that the conspiracy's existence extended to within the limitations period. This same rule should apply to the element of membership.

[2] The Government's precise language is: "In a conspiracy prosecution, when the defendant does raise the limitations defense, the government has the burden to show that the individual defendant became a member of the conspiracy and that the conspiracy continued within the applicable limitations period[.]" (Gov't Br. 24 (citing *Grunewald*, 353 U.S. at 396); *see also id.* at 41 ("[T]he government satisfied its burden under Section 3282(a) when it proved beyond a reasonable doubt that the conspiracy 'was still in existence' during the limitations period." (quoting *Grunewald*, 353 U.S. at 396)).) To be clear, *Grunewald* did not address the membership element of conspiracy and thus cannot be used as affirmative support for the proposition that, when a statute

Further, the Government ignores the fact that *Grunewald* required the prosecution to prove *both* that "the conspiracy" existed during the statutory period and that an overt act in furtherance of the conspiracy was performed within that period, as commission of an overt act was (unlike in this case) a separate and essential element of the conspiracy charged. *See* 353 U.S. at 396-97 ("For where substantiation of a conspiracy charge requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period."). The Government would thus have this Court read *Grunewald* to require the prosecution to prove every element of the crime of conspiracy within the statutory period *except* the element of membership.[3] Again, the Government provides no

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of limitations defense is raised, the Government's burden is limited to proof that "the individual defendant became a member of the conspiracy" at any time, as opposed to proof that the defendant's membership continued to within the statutory period.

[3] Under the Government's logic, proof of an overt act at any time (including outside the limitations period) should have been all that was necessary, so long as it proved that "the conspiracy" extended to within the statutory period.

reasoned basis for why this should be the case, especially given that membership is the only element that necessarily connects a particular defendant to criminal conduct.

To the extent that the Government's true argument in this case is that it *does* bear the burden of proving membership within the limitations period, but, as a matter of law, it satisfies that burden by proving membership outside the limitations period, such a rule cannot apply *a fortiori* where there is evidence of withdrawal. While generally a jury may presume that a defendant's conspiratorial membership continues until he takes affirmative steps to withdraw that membership, the jury must be permitted to consider evidence of nonmembership (i.e., withdrawal) in assessing whether the Government has met its burden to prove membership within the limitations period.

Here, the district court's instruction only permitted the jury to consider evidence of withdrawal in determining whether *Petitioner* had met *his* burden to prove that he was not a member of the charged conspiracies within the limitations period; it did not allow the jury to consider such evidence in assessing the Government's case. Under such circumstances, it cannot be said that the Government proved the defendant's membership within the statutory period beyond a reasonable doubt. Because evidence of withdrawal outside the limitations period may lead a jury to doubt whether the Government has in fact met its burden, the jury must be permitted to consider such evidence—in conjunction with all evidence of membership, whether within or without the limitations period—in assessing the Government's case. (*See* Pet'r Br. 38-41.)

## II. CONTINUED MEMBERSHIP, NOT OVERT ACTION, IS REQUIRED WITHIN THE STATUTORY PERIOD.

The Government contends that Petitioner's argument would require the jury to find, beyond a reasonable doubt, that a defendant committed an overt act of membership during the limitations period. (*See, e.g.*, Gov't Br. 10, 11-12, 15 & n.6, 17, 36, 38, 42; *see also id.* 36, 38, 42 (claiming Petitioner would require "active 'participation'"). This is a misrepresentation of Petitioner's argument.

Of course overt action on the part of the individual defendant during the limitations period is not required. As Petitioner has readily acknowledged, neither conspiracy statute under which he was charged requires the commission of an overt act by *anyone* at *any time*—whether before or during the statutory period (Pet. Br. 26 n.15); and even if he had been charged with an overt act conspiracy, the Government would not have been required to prove that Petitioner himself ever committed an overt act, let alone during the limitations period.

Membership within the limitations period is required, however.[4] When a statute of limitations defense is raised, the Government can prove membership within the limitations period the same way it proves membership in the first instance: through either direct evidence or "infer[ences] from the circumstances and conduct of the parties." (J.A. 288a.) If the jury is satisfied that a defendant was a member of an established conspiracy at some point before his alleged withdrawal, it would be free to infer from that same evidence, or additional evidence, continued membership after the alleged withdrawal, extending into the limitations period. But due process requires that the jury be permitted to consider the defendant's evidence of withdrawal in deciding whether the Government has proved beyond a reasonable doubt that the defendant committed an offense within the statutory period; i.e., whether the evidence of withdrawal creates a reasonable doubt as to his membership.

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[4] To the extent the Government interprets Petitioner's use of the word "participation" as implying that the membership element of conspiracy includes an overt action requirement, Petitioner notes: (1) the term was taken directly from the district court's jury instructions in this case; (2) it was the Government that proposed those jury instructions (*see* Dist. Ct. Dkt. 1100); and (3) the Government itself has used "participation" to describe the element of membership in its briefing before this Court (*see, e.g.*, Gov't Opp'n Cert. Pet. 32; Gov't Br. 14).

Ultimately, the Government's mischaracterization is a distraction from the question presented in this case: Whether the Government had the burden to prove Petitioner's membership in the alleged conspiracies during the limitations period.

## III. THE GOVERNMENT RELIES ON LABELS IN PLACE OF LEGAL REASONING TO AVOID THE SUBSTANCE OF PETITIONER'S ARGUMENTS.

This Court has consistently rejected the use of labels as substitutes for legal reasoning and analysis. As the Court stated in *Apprendi v. New Jersey*—where the State attempted to use the term "sentencing factor" to avoid certain due process requirements: "[T]he relevant inquiry is one not of form, but of effect"; "[l]abels do not afford an acceptable answer." 530 U.S. 466, 494 (2000) (second alteration in original) (internal quotation marks omitted).

Here, the Government uses the terms "affirmative defense" and "element" throughout its brief to fit this case into an analytical mold in which it does not belong. The Government asserts that, because the statute of limitations and the defense of withdrawal are "affirmative defenses," and because the statute of limitations is not an "element," the legal framework this Court laid out in *Dixon v. United States*, 548 U.S. 1 (2006), should be applied to this case. As discussed at length in Petitioner's opening brief, however, withdrawal and the statute of limitations differ fundamentally from the defense of duress at issue in *Dixon*. The *Dixon* framework does not apply.

In *Dixon*, the defendant was charged with receiving a firearm while under indictment and making false statements in connection with the acquisition of a firearm. *Id.* at 3. At trial, the defendant essentially admitted all of the elements of the charged offenses, but maintained that she had acted under duress because her boyfriend threatened to hurt her and her daughters if she did not purchase guns for him. *Id.* at 4. On appeal, she challenged the district court's jury instruction, arguing that it erroneously placed the burden on her to prove duress by a preponderance of the evidence instead of requiring the Government to prove beyond a reasonable doubt that she did not act under duress. *Id.*

In this Court, the defendant in *Dixon* made two arguments: first, that the defense of duress negated the *mens rea* element necessary for conviction, and, therefore, due process required the Government to retain the burden of persuasion on that element; and second, that the district court's instruction was "contrary to modern common law." *Id.* at 5.

With respect to the first argument—which is similar in substance, though not merit, to the argument Petitioner raises here—the Court examined the *mens rea* elements of the charged offenses to determine if the defense of duress negated those elements. The statutes at issue required the defendant to act "knowingly" or "willfully." *Id.* at 5. The Court observed that "even if . . . petitioner's will was overborne by the threats made against her and her daughters, she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm." *Id.* at 6. Because the duress defense "in no way disprove[d] an element of th[e charged] crimes," the Court concluded that the challenged instruction did not offend due process. *Id.* at 6-8.

It was not until the *Dixon* Court rejected the defendant's due process argument that it went on to address her argument with respect to the modern common law. Because duress is a common law affirmative defense, as opposed to a statutory one, the Court concluded that it was required to "determine what the defense would look like as Congress may have contemplated it." *Id.* at 13 (internal citation marks omitted). In doing so, the Court examined, *inter alia*, "the long established common law," the consensus among federal courts, and the comparative convenience of producing evidence. *Id.* at 9, 14-15. It is this legal framework that the Government primarily employs in this case.

The Government's attempt to shift this Court's focus from the due process context and towards considerations that are inappropriate in that context should be resisted—for even if it were Congress's intent to do so, it cannot violate the Due Process Clause. Because withdrawal outside the statute of limitations period is not a defense of justification or excuse, but instead directly negates the membership element of a conspiracy charge within the statutory period (Pet'r Br. 37, 47; *see also id.* at 29-31), *Dixon*'s "modern common law" analysis simply does not apply. The Government's use of the label "affirmative defense" does not change this conclusion.

To the extent the Government does address Petitioner's due process arguments, it does so by focusing on "form" rather than "effect." For example, while the Government admits that it has the burden to prove that a criminal offense was committed within the relevant limitations period, it clarifies that it "is not required to prove that it satisfied the limitations requirement as *an element* of the . . . offense." (Gov't Br. 37 (emphasis added).) Further, by isolating each defense and focusing on them separately, the Government fails to address how the two defenses work together, evading the very heart of Petitioner's argument. *See Read*, 658 F.2d at 1233 ("[W]ithdrawal becomes a complete defense only when coupled with the defense of the statute of limitations.").

In addition, the Government entirely ignores the fact that even in cases like *Leland v. Oregon*, 343 U.S. 790 (1952), and *Martin v. Ohio*, 480 U.S. 228 (1987)—cases cited by the Government as involving the affirmative defenses of justification and excuse—defendants were given the opportunity to attack the Government's proof with evidence supporting their affirmative defenses, even if they could not meet their burdens of proof with respect to those defenses. (*See* Pet'r Br. 38-41.) The district court's instruction in this case allowed the jury to consider evidence of withdrawal outside the limitations period only with respect to whether the defendant proved the defense by a preponderance. (J.A. 328a.) Thus, even if withdrawal outside the statute of limitations *were* the type of affirmative defense involved in *Dixon* and its predecessors—which it is not—under *Leland* and *Martin*, the district court's instruction would still violate due process. The Government fails to address this issue.

Even if *Dixon*'s "modern common law" analysis did apply to this case, the Government overlooks that in enacting the conspiracy statutes at issue, Congress legislated against the backdrop of the statute of limitations, which is itself a clear expression of congressional intent. (*See* Pet'r Br. 9-19.) Further, though the Government refers to the limitations statute as an "affirmative defense"—which this Court has not done in the criminal context—the Government concedes that it has traditionally borne the burden of proof with respect to the statute, a fact that directly contradicts the Government's intended implication. (Gov't Br. 23 ("Congress[ has provided] a period of limitations, which the government must satisfy with proof when it is placed in issue[.]").)

The Government also relies on some of the federal circuit courts that have "consistently interpreted *Hyde* as placing on a defendant the risk of non-persuasion as to the defense of withdrawal."[5] (Gov't Br. 20.) But nowhere in its brief does the Government actually contend that these interpretations are correct.[6] In the Government's own words, *Hyde* simply held that "a conspirator may invoke [a withdrawal] defense to start the running of the statute of limitations by taking an affirmative act of withdrawal."[7] (Gov't Br. 20.) That is precisely what *Hyde* holds, and nothing more. Consistent misinterpretation of *Hyde* is hardly sufficient support for the Government's position in this case.

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[5] *Blue v. United States*, 138 F.2d 351 (6th Cir. 1943) (Gov't Br. 21), does not support this proposition. In *Blue*, the court did nothing more than review the holding of *Hyde* that a conspiracy continues to exist for each defendant "until there is shown some affirmative act of withdrawal." *Id.* at 360. *Blue*, like *Hyde*, does not address the burden of *persuasion* once such evidence is produced.

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[6] Even the *Harvard Law Review* article cited by the Government (Gov't Br. 21) notes that *Hyde* "might have been interpreted as merely shifting the production burden on the issue of withdrawal to the defendant, and leaving the persuasion burden with the state." *Developments in the Law–Criminal Conspiracy*, 72 Harv. L. Rev. 922, 958 (1959).

[7] The Government claims that in a subsequent civil case, "the Court viewed the burden of persuasion [on withdrawal] as resting with the defendants." (Gov't Br. 20-21 n.8 (citing *Local 167, International Brotherhood of Teamsters v. United States*, 291 U.S. 293 (1934)).) *Local 167* was a civil injunction action brought to stop anticompetitive practices of which one of the defendants had been convicted in a criminal prosecution. The defendants argued that they had abandoned the conspiracy before the civil suit was filed. 291 U.S. at 297. The Court, citing *Hyde*, stated that "[i]n the absence of definite proof to that effect, abandonment will not be presumed." *Id.* at 298. While the defendants presented no evidence, the "government introduced substantial evidence," which was "uncontradicted and unexplained," that the defendants continued to participate in the conspiracy. *Id.* Thus, contrary to the Government's claim, the case does not discuss the burden of proof in the civil context. It can be read to imply that the Government met its burden of proof under the circumstances, just as easily as it can be given the meaning the Government imputes to it.

## IV. THE GOVERNMENT'S DUE PROCESS BURDEN CANNOT BE CAST ASIDE FOR PROSECUTORIAL CONVENIENCE.

The Government contends that "substantial practical considerations" support placing the burden on a criminal defendant to prove that he was not a member of an alleged conspiracy during the statute of limitations period. (Gov't Br. 25.) According to the Government, proving the defendant's membership during the statutory period would be a great hardship to it—one the criminal defendant would be "better situated" to bear. (*Id.*) In making this argument, the Government ignores principles at the very core of our criminal justice system; and, in any event, overstates any supposed difficulties.

Though the Court has entertained comparative convenience arguments in cases involving affirmative defenses of justification and excuse, *see, e.g., Patterson v. New York*, 432 U.S. 197 (1977) (cited at Gov't Br. 26), it has flatly rejected such arguments in cases involving element-negating defenses. As the Court stated in *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975):

> It has been suggested . . . that because of the difficulties in negating an argument that the homicide was committed in the heat of passion[,] the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

Thus, in cases such as this, consideration of government hardship should not be—and has not been—a part of the Court's analysis.[8]

Even if convenience to the Government were a proper consideration, the Government's arguments are flawed in numerous respects. In addition to relying on civil law tenets that do not apply in the criminal context when due process is at issue[9] (Gov't Br. 26-27); failing to recognize that the legal analysis that applies to the Rules of Evidence is not the same as that which applies to the question of guilt (*id.* at 27-28); and raising issues of notice to which Congress or the Court could easily respond if they so chose (*id.* at 28), *see, e.g.*, Fed. R. Crim. P. 12.1 (Notice of an Alibi Defense); the Government also complains that it will be unable to call the defendant and his co-conspirators as witnesses at trial due to their Fifth Amendment rights. But this is a difficulty with which the Government must deal in every conspiracy prosecution, regardless of whether the statute of limitations or withdrawal is raised. Moreover, as this case demonstrates, the Government's contention is greatly exaggerated. Here, as in most conspiracy cases, the Government called numerous cooperating co-conspirators, victims, and other witnesses, many of whom—the Government contends—had knowledge of Petitioner's membership in the alleged conspiracy both inside *and* outside the statutory period. The Government may also rely on documentary evidence and evidence obtained from wiretaps, as it did in the present case. In light of these tools, the Government provides no reason why proving membership within the statutory period is any more difficult than proving membership outside that period—indeed, if anything, it would seem easier to prove a defendant's more recent conduct.[10] And because proof of the defendant's membership within the statutory period will necessarily disprove his withdrawal defense, the Government's protestations with respect to "having to prove a negative" (Gov't Br. 26) are unfounded. As the Government itself acknowledges, "'the party having in form the affirmative allegation'"—in this case, that Petitioner committed the crime of conspiracy within the statutory period—"is the one who pulls the laboring oar." (*Id.* (citation omitted).)

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[8] The Government cites *Morrison v. California*, 291 U.S. 82, 91 (1934), for the proposition that "the burden of proof may properly be placed on the defendant if there exists 'a manifest disparity in convenience of proof and opportunity for knowledge.'" (Gov't Br. 26.) Putting aside the fact that there is no such manifest disparity in the present case, the Court in *Patterson*, also cited by the Government, expressly rejected the reasoning of *Morrison* in this regard, stating: "Of course, if the *Morrison* cases are understood as approving shifting to the defendant the burden of disproving a fact necessary to constitute the crime, [they] could not coexist with *In re Winship* . . . and *Mullaney*." 432 U.S. at 203 n.9.

[9] As Justice Harlan recognized in his concurrence in *Winship*, "due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation." 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (internal footnote omitted).

Moreover, the difficulty of obtaining witness testimony affects defendants at least as much as the Government, if not more. Petitioner acknowledges that a defendant must meet a burden of production for the issue of withdrawal to be presented to the jury. The right of the defendant's co-conspirators (who will likely be his co-defendants unless they decide to cooperate with the Government) not to testify—in addition to hearsay rules—will severely impact the defendant's ability to meet this burden. And to the extent the defendant is able to call witnesses on his behalf, those witnesses may be discredited via cross-examination or disbelieved. This is no different than when a defendant provides affirmative evidence that he never joined a conspiracy at all. The Government should hardly be heard to complain about a lack of access.[11]

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[10] In addition, unlike duress, which "in most instances depends upon conduct that takes place before the criminal act," *Dixon*, 548 U.S. at 19 (Kennedy, J., concurring), withdrawal, by definition, occurs after the conspiracy has been formed.

Finally, the Government's contention that it would be too difficult for it to bear the burden of proof with respect to a defendant's membership within the limitations period is belied by the procedural history in this case. The Government never made such a claim either in the district court, the court of appeals, or in opposition to Petitioner's certiorari petition. In fact, it essentially took the opposite position. In the district court, it agreed to accept the burden of proof, voicing no complaint that this would pose any difficulty or obstacle. And in both its brief on appeal and its opposition to the petition for certiorari, the Government pointed to what it claimed was ample evidence establishing Petitioner's continued participation in the conspiracies during the relevant five-year period.[12] (*See, e.g.*, Gov't Opp'n to Cert. Pet. 32.)

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[11] The Government's argument also ignores the situation where a defendant asserts withdrawal based upon a disclosure to authorities. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463-64 (1978). In such a case, it is simple for the Government to call as a witness the officer to whom the disclosure was allegedly made to refute the evidence.

The Government's comparative convenience arguments are without merit and should, in any event, play no part in this Court's due process analysis.

## V. THE DISTRICT COURT'S INSTRUCTION CONSTITUTED STRUCTURAL ERROR.

Petitioner did not "concede[] in his certiorari-stage pleadings that the harmless error standard would apply," as the Government contends. (Gov't Br. 12.) Petitioner argued in the court of appeals that the instruction constituted structural error and, in the alternative, was not harmless beyond a reasonable doubt. Because the court found no error in the instruction, it did not address these arguments. For this reason, Petitioner did not separately address the structural/harmless error issue in his certiorari petition. In its opposition to the certiorari petition, the Government argued that if the instruction was error, it was harmless. It was in response to this harmless error argument that Petitioner pointed out that harmlessness would have to be shown beyond a reasonable doubt due to the constitutional nature of the error. Petitioner did not thereby intend to give up the structural error contention that had been his primary argument on direct appeal.

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[12] The Government fails to cite a single case where the Government has claimed any difficulty in disproving withdrawal, notwithstanding that several circuits have for some time placed that burden on the Government. In fact, the Government appears to be readily able to produce evidence to rebut withdrawal (i.e. to prove membership within the limitations period). *See, e.g.*, *United States v. Fishman*, 645 F.3d 1175, 1196-97 (10th Cir. 2011) (government presented "ample evidence" of defendant's "activities furthering the conspiracy" after he allegedly withdrew); *United States v. Flaharty*, 295 F.3d 182, 193 (2d Cir. 2002) (government presented evidence that defendant "resumed, and perhaps even elevated, his participation in the conspiracy" after he allegedly withdrew).

As Petitioner argued before the court of appeals, the district court's instruction in this case "def[ies] analysis by 'harmless-error' standards." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (internal quotation marks omitted). As the Court stated in *Sullivan*: "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt." 508 U.S. at 278. In this case, because the burden was shifted to Petitioner, Petitioner's convictions could have rested on a determination by the jury that Petitioner was *not even* probably guilty of an offense for which the Government could prosecute him. Petitioner was deprived of a jury finding on the *only* element of the conspiracy offenses that connected him to criminally punishable conduct. His convictions, therefore, must be reversed.

## CONCLUSION

For the foregoing reasons, as well as those stated in the opening briefs of Mr. Smith and Amicus Curiae, the National Association of Criminal Defense Lawyers, the judgment of the court of appeals should be reversed and remanded.

Respectfully submitted,

A.J. KRAMER
FEDERAL PUBLIC DEFENDER
*Counsel of Record*
ROSANNA M. TAORMINA
ASSISTANT FEDERAL PUBLIC DEFENDER
625 Indiana Ave., N.W.
Suite 550
Washington, DC 20004
(202) 208-7500
A._J._Kramer@fd.org

*Counsel for Petitioner Calvin Smith*

Dated: October 26, 2012

# AMICUS
# CURIAE
# BRIEF

No. 11-8976

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IN THE

# Supreme Court Of The United States

CALVIN SMITH AND JOHN RAYNOR,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

# BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS SUPPORTING REVERSAL

TIMOTHY P. O'TOOLE
*Counsel of Record*
JEFFREY HAHN
MILLER & CHEVALIER
CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

## QUESTION PRESENTED

Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.

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## INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] As practitioners representing clients in criminal trials throughout the federal and state court system, NACDL has a keen interest in ensuring that every court, no matter the jurisdiction, holds the prosecution to its constitutional burden of establishing beyond a reasonable doubt each element of a criminal charge. The reasonable doubt standard is a criminal defendant's most effective counter-weight to the many advantages enjoyed by the prosecution. Because the decision of the court below, and others with which it is in agreement, threatens to dilute this vital protection in cases where a defendant properly raises the defense of withdrawal from a conspiracy prior to the statute of limitations (and potentially in other cases in which a defendant raises an element-negating defense), this case is of the utmost interest to NACDL.

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[1] Pursuant to Sup. Ct. Rule 37.2(a), counsel of record for all parties received notice of the intent of *amicus curiae* to file a brief at least 10 days prior to the due date. Also pursuant to Sup. Ct. Rule 37.2(a), a letter of consent from each party accompanies this filing. Pursuant to Sup. Ct. Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The requirement that the prosecution prove each element of the offense beyond a reasonable doubt is perhaps the single most important safeguard against wrongful convictions. This requirement is in many respects "the great equalizer," returning a semblance of balance to a criminal justice process in which a lone individual must face the awesome investigative, charging and prosecutorial powers of the state. But where the government is absolved from having to disprove a properly raised element-negating defense, this balance is impermissibly skewed in favor of the government, which has a significantly stronger hand with respect to all aspects of the criminal process.

The problem is particularly acute in cases involving conspiracy, a notoriously vague offense that hinges largely on a criminal defendant's mental state, affords the prosecution significant evidentiary advantages, and subjects defendants to liability for acts they did not personally commit. As a result, the district court's withdrawal instruction in this case – which effectively absolved the Government from having to prove beyond a reasonable doubt that Mr. Smith participated in the conspiracies in question within the limitations period – serves only to further imperil defendants faced with conspiracy charges. As practitioners, we urge the Court to examine this problem closely and to restore the proper constitutional equilibrium on this important issue.

## ARGUMENT

### I. The Requirement that the Prosecution Prove Guilt Beyond a Reasonable Doubt Is a Criminal Defendant's Foremost Safeguard Against a Wrongful Conviction

"[T]he duty of the Government to establish . . . guilt beyond a reasonable doubt," Justice Frankfurter wrote, is "basic in our law and rightly one of the boasts of a free society." *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting). It "provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" and is thus "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted). This Court in *Winship* thus confirmed that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Indeed, the reasonable doubt standard is so important to the integrity of a criminal trial that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (explaining that "a misdescription of the burden of proof . . . vitiates all the jury's findings.").

This Court's constitutional enshrinement of the reasonable doubt standard, however, is not grounded in mere theory or rhetoric, but rather in the recognition that it stands as the single most important corrective to the structural disadvantages faced by criminal defendants. And those disadvantages are many.

To build its case, the prosecution has behind it the investigatory capabilities and resources of the police and the subpoena power of the grand jury. In contrast, court-appointed lawyers who represent the bulk of criminal defendants often have crushing caseloads and minimal investigative resources, leaving them with neither the time nor the funding for anything approaching the government's investigation of the case. The reasonable doubt requirement mitigates this stark disparity by holding the prosecution's evidence to the strictest of standards.

But even where the prosecution's evidence is thin, simply being charged with a criminal offense can be a stigma unto itself, no matter the eventual outcome. Here too, the reasonable doubt requirement protects individuals under investigation from the black mark of an unfounded criminal charge by ensuring that prosecutors bring only their most meritorious cases. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457, 458 (Mar. 1989). The American Bar Association's Standards for Criminal Justice require prosecutors to consider the likelihood of conviction in making their charging decision, a calculus that depends in large part on where the burden of proof lies. Specifically, Standard 3-3.9(a) provides that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." *See* American Bar Association, *Standards For Criminal Justice*, Prosecution Function § 3-3.9, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.9 (last visited Aug. 23, 2012). If, as in this case, a critical disputed fact upon which a conviction turns is one that the prosecution need not prove beyond a reasonable doubt (here, that Mr. Smith's membership in the conspiracy occurred during the limitations period, despite Mr. Smith's introduction and elicitation of significant facts at trial suggesting he withdrew from the conspiracy before the onset of the limitations period), a prosecutor may well be more likely to bring a case that she otherwise would not.

The reasonable doubt standard is also a critical equalizer in the context of plea bargaining. Every criminal defendant faces the same choice: go to trial and risk the possibility of a potentially severe punishment, or opt for the guarantee of a more lenient sanction through a plea agreement. In making this decision, a key factor is the defendant's assessment of the prosecution's case, the strength of which directly correlates with the burden of proof. If the prosecution is relieved of its full constitutional burden as to a fact essential to conviction, a defendant may be more likely to plea. The reasonable doubt rule thus reduces the pressure defendants face to plead guilty to crimes they did not commit.

Once a case proceeds to trial, defendants also face evidentiary disadvantages for which the reasonable doubt requirement compensates. As virtually every prosecutor reminds jurors in opening statements, prosecutors represent the "people," the "state," or "the United States," and claim the mantle of the community in a way that tends to make jurors believe that prosecutors come to the case solely to do justice. By contrast, given the potential life-changing repercussions of a criminal conviction, criminal defendants begin their cases with their own interests front and center. This has many consequences for the criminal trial, the most important of which is that a criminal defendant's most compelling (and perhaps sole) exculpatory evidence – his own testimony – is inherently tainted by the defendant's interest in self-preservation. The trier of fact is thus likely to discount even the most credible and reliable exculpatory testimony offered by the accused. *See* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 Calif. L. Rev. 1665, 1695 (Oct. 1987). And this is before accounting for the myriad other factors unrelated to a defendant's guilt or innocence that can diminish the defendant's credibility in the eyes of the fact finder, such as a prior conviction, or simply whether the defendant appears nervous or unlikeable. Placing the burden of proof squarely, and solely, on the prosecution puts the onus on the prosecution's evidence, and ensures that the defendant's subjective credibility or objective bias does not become the issue upon which the case turns.

Not only is a criminal defendant's exculpatory testimony potentially counter-productive as an evidentiary matter, but putting defendants in the position where they feel they have no choice but to offer such testimony impinges on the Fifth Amendment. This Court has made clear that "[e]very criminal defendant is privileged to testify in his own defense, *or to refuse to do so*." *Harris v. New York*, 401 U.S. 222, 225 (1971) (emphasis added). But where guilt or innocence turns on a fact that the prosecution is absolved from having to disprove, and for which the only evidence is the defendant's own testimony, a defendant effectively *cannot* refuse to testify in his own defense, since the alternative is likely to be a prison term. Ensuring that the prosecution is held fully to its constitutional burden of proving each element beyond a reasonable doubt thus gives effect to the Fifth Amendment's testimonial privilege.

In short, the prosecution's burden to prove guilt beyond a reasonable doubt offers vital protections to defendants at virtually every stage of the criminal justice process, from charging decisions, to plea agreements, to the conduct of trials themselves. Diluting the reasonable doubt requirement, therefore, would increase the number of defendants charged with crimes they did not commit, increase the likelihood that defendants will plea to such crimes, and increase the pressure on defendants to offer their own testimonial evidence despite their Fifth Amendment rights.

## II. By Relieving the Prosecution from Having to Prove that Mr. Smith Participated In the Conspiracy During the Limitations Period, the D.C. Circuit's Opinion Highlights the Very Imbalance the Reasonable Doubt Standard Serves to Correct

The District Court's withdrawal instruction in this case absolved the Government from having to prove beyond a reasonable doubt an element essential for a conspiracy conviction. While that is problematic – and unconstitutional – in any case, it is particularly troubling in this case, where the crime is conspiracy, and the omitted element is relevant to the defendant's mens rea. Conspiracy cases offer the Government unique advantages unavailable in other cases, and present defendants with equally unique perils; if balance needs to be restored in any direction, it is on the side of defendants, not the Government. And while mens rea requirements are meant to protect defendants from unwarranted conviction, they have been markedly diluted in recent years, a trend that the D.C. Circuit's opinion will serve only to exacerbate.

### A. Mr. Smith's Withdrawal Defense Negated the "Participation" Element of Conspiracy

As an initial matter, even the D.C. Circuit acknowledged that "when a defendant raises (by meeting his burden of production) a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove [that] defense." *United States v. Moore*, 651 F.3d 30, 89 (D.C. Cir. 2011). This rule is compelled by simple logic: where a properly raised defense negates an element of the charged crime, the prosecution necessarily cannot prove that element "beyond a reasonable doubt" without disproving the defense. Demanding that the prosecution disprove an element-negating defense, therefore, ensures that the prosecution has satisfied its constitutional burden of proof. Conversely, where the prosecution need not disprove a defense even if it negates an element of the charged crime, the prosecution is relieved of its burden to establish every element beyond a reasonable doubt.

Not even the Government can dispute that the defense at issue in this case – withdrawal from a conspiracy prior to the statute of limitations period – directly negates the "knowingly participated" element of the two conspiracy offenses (a narcotics conspiracy and a RICO conspiracy) with which Mr. Smith was charged. With respect to the narcotics conspiracy, the district court instructed the jury that the Government must prove beyond a reasonable doubt "that a particular defendant knowingly and willfully participated in the conspiracy . . . ." J.A. 287-91. The district court similarly told the jury that a RICO conspiracy requires "that the particular defendant . . . knowingly and intentionally agreed with another person to conduct or participate in the conduct of the affairs of the enterprise." J.A. 298. Of course, a defendant who has withdrawn from a conspiracy prior to the statute of limitations period cannot also have "participated" in it during the limitations period; the two are mutually exclusive. *See United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981) ("Withdrawal, then, directly negates the element of membership in the conspiracy during the period of the statute of limitations.").

Thus, after Mr. Smith met his burden of production that he withdrew from the conspiracies prior to the statute of limitations period, the Government at that point could not possibly have proven "beyond a reasonable doubt" that Mr. Smith participated in the conspiracies during the limitations period unless it disproved Mr. Smith's withdrawal defense. Nevertheless, the district court excused the prosecution from having to do exactly that, and instead foisted on Mr. Smith the burden of proving his withdrawal defense by a preponderance of the evidence, and in so doing violated his Due Process rights. While unconstitutionally shifting the burden to the defendant to prove an element-negating defense increases "the risk of convictions resting on factual error" in any type of case, *In re Winship*, 397 U.S. 358, 363 (1970), it is particularly dangerous here, where the crime is conspiracy, and the element concerns the defendant's mental state.

### B. Requiring the Defendant to Prove Withdrawal Makes Defendants Even More Vulnerable to Baseless Conspiracy Convictions

The district court's withdrawal instruction, if approved by this Court, would vest in the prosecution yet another advantage among the many it already enjoys in cases charging conspiracy, "that elastic, sprawling and pervasive offense." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Even 60 years ago, when conspiracy law was still in its early stages, Justice Jackson recognized that "loose practice as to [conspiracy] constitutes a serious threat to fairness in our administration of justice." *Id.* at 446. That was true then; it is equally true now.

First, given the secrecy associated with conspiracy and the perceived difficulty in proving its central act – an agreement – prosecutors are afforded significant evidentiary advantages. To prove an agreement, the prosecutor need not produce evidence of a formal offer and acceptance (or "meeting of the minds"); rather, "[t]he elements of conspiracy . . . can be proven entirely by circumstantial evidence." *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005). The jury thus "may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *United States v. Dazey*, 403 F.3d 1147, 1159 (10th Cir. 2005). As a result, "the illusory quality of agreement is increased by the fact that it, like intent, must inevitably be based upon assumptions about what people acting in certain ways must have had in mind." Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 410 (1959). In addition, the Federal Rules of Evidence exempt from the hearsay rules a co-conspirator's out-of-court statements. *See* Fed. R. Evid. 801(d)(2)(E). With such relaxed evidentiary standards, the prospect that a jury will wrongfully convict a defendant in a conspiracy case based on tenuous evidence and untested out-of-court statements increases markedly.

Compounding matters is the inchoate nature of conspiracy, which often results in the merger of the crime's mens rea and actus reus requirements, making the prosecution's job even easier. This is because with conspiracy, "the criminal agreement itself is the *actus reus*." *United States v. Shabani*, 513 U.S. 10, 16 (1994). And as explained above, an agreement, seeing as it almost never takes the form of a formal agreement or written document, hinges almost entirely on inferences regarding a defendant's intentions and state of mind. The same conduct, therefore – often, a defendant's words – can serve both to prove his guilty mind and guilty conduct. *Id.* While some conspiracy crimes, to be sure, also require the prosecution to prove an overt act, many do not. *See, e.g., id.* at 17 (holding that "proof of an overt act is not required to establish a violation of 21 U.S.C. § 846," *i.e.*, Title I drug conspiracies); *Whitfield v. United States*, 543 U.S. 209, 219 (2005) ("we hold that conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), does not require proof of an overt act"). But even for the crimes for which an overt act is required, it hardly levels the playing field, since virtually anything can serve as an "overt act." *See United States v. Scallion*, 533 F.2d 903, 911 (5th Cir. 1976) (holding that traveling to another city is an overt act); *Bartoli v. United States*, 192 F.2d 130 (4th Cir. 1951) (holding that a phone call is an overt act).

While all of this would be troubling on its own, it is even more so because of the consequences a conspiracy conviction carries. Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a defendant convicted of conspiracy can be held vicariously liable for all "reasonably foreseeable" crimes of his co-conspirators. While the foreseeability requirement, in theory, is meant to assure a degree of connection between the conspirator and the acts of his co-conspirators for which he is vicariously liable, in practice it offers little assurance at all. *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass 2003), *aff'd*, 434 F.3d 92 (1st Cir. 2006) ("'Foreseeability' is the language of negligence law. It is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability."); Mark Noferi, *Towards Attenuation: A 'New' Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, 113 (2006) ("courts have criticized the 'reasonably foreseeable' requirement as providing no meaningful limits on vicarious liability."). Thus, a defendant convicted of conspiracy could well find himself also convicted of a substantive crime he did not commit – even first degree murder – based on evidence (such as the hearsay of a co-conspirator) that would be insufficient or even inadmissible in a stand-alone murder trial against the defendant who actually committed the murder. *See also United States v. Sklena*, No. 11-2589 (7th Cir. Aug. 23, 2012) (holding that evidence against defendant convicted of wire and commodities fraud was insufficient to prove actual knowledge or conscious avoidance, but sufficient for purposes of *Pinkerton* liability). Armed with the cudgel of vicarious liability and relaxed evidentiary standards, prosecutors have overwhelming leverage to extract plea bargains from defendants in conspiracy cases. If the defendant instead chooses to force the Government to prove its case in court, he places his fate in the vagaries of conspiracy law and its many attendant advantages for the prosecution.

Against this backdrop, this Court should not vest the prosecution with yet another advantage in conspiracy cases. By requiring the Government to disprove that a defendant who met his burden of production on withdrawal did not in fact withdraw, this Court – in addition to being faithful to the Due Process Clause – would finally restore some semblance of balance to the heavily lopsided field of conspiracy law.

### C. Relieving Prosecutors of Their Burden to Prove a Defendant's Mental State Is Uniquely Prejudicial to Defendants

The district court's withdrawal instruction, and the similar approach taken by other courts, not only adds to the perils defendants face in conspiracy cases. It also highlights the drift away from robust mens rea requirements, since the element negated by Mr. Smith's withdrawal defense – the "knowing" participation in a conspiracy – goes directly to Mr. Smith's mens rea.

Relieving prosecutors of their full constitutional burden to establish a defendant's mental state is especially troublesome to the amicus and its members. The mens rea requirement "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). But as this Court recognized in *Mullaney v. Wilbur*, unlike other elements of a charged crime, "intent is typically considered a fact peculiarly within the knowledge of the defendant." 421 U.S.

684, 702 (1975). As a result, if prosecutors need not disprove an element-negating mental state – such as "knowingly" partaking in a conspiracy – defendants may have no choice but to testify in their own defense, with all of the evidentiary and constitutional downsides that such testimony entails. Not only may such testimony be counter-productive at trial by taking the jury's focus off of the prosecution's case and shifting it to the defendant's perceived credibility, but the possibility of being forced to offer it would certainly factor into the defendant's decision whether to accept a plea or go to trial.

The problem of relieving prosecutors of their obligation to sufficiently prove a criminal defendant's mental state, as happened in this case, is an especially salient one. A joint report released in 2010 by NACDL and the Heritage Foundation detailed the proliferation of federal criminal offenses with a deficient or non-existent mens rea requirement. *See* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, at IX (Apr. 2010), http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent (explaining that of the 446 non-violent criminal offenses proposed by the 109th Congress, "57 percent lacked an adequate *mens rea* requirement"). The groups recognized that "[*m*]ens *rea* requirements . . . not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or indadvertently." *Id.* at 4-5. With "the disappearance of adequate *mens rea* requirements," the criminal law "becomes a broad template for the misuse and abuse of governmental power." *Id.* at 10.

Ensuring that prosecutors bear fully the burden of establishing a defendant's mental state, therefore, is a critical check on prosecutorial power. But the district court's instruction effectively absolved the Government of that obligation here by requiring Mr. Smith to prove by a preponderance of the evidence that he withdrew from the charged conspiracies, and that he thus did not "*knowingly* participat[e]" in them. This Court should put a stop to the continued dilution of mens rea requirements.

* * *

None of this is to suggest that Mr. Smith or other criminal defendants in like circumstances should play no role in establishing their withdrawal from a conspiracy prior to the statute of limitations (or in establishing any other element-negating defense). To the contrary, this Court in *Wilbur*, after holding that Maine impermissibly required a defendant charged with murder to prove that he acted in the heat of passion, explicitly approved of the requirement in many states that the defendant "show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element." *Wilbur*, 421 U.S. at 702 n.28. Indeed, the Court made clear that "[n]othing in [its] opinion is intended to affect that requirement." *Id.* Thus, even if this Court reverses, Mr. Smith and others in his position would still be required to at least meet their burden of production regarding their element-negating defenses.

But once an element negating defense is properly raised, the prosecution, in order to satisfy its constitutional burden to prove each element beyond a reasonable doubt, must disprove that defense. Relieving the prosecution of this obligation not only offends this Court's precedents and the United States Constitution, but, as explained, it substantially undermines the fairness of trial by diluting one of the most important protections against wrongful convictions.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded.

Respectfully submitted,

TIMOTHY P. O'TOOLE
*Counsel of Record*
JEFFREY HAHN
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

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